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In The
Supreme Court of the United States

ALEX RUDAJ,

Petitioner,

v.

UNITED STATES,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR WRIT OF CERTIORARI

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January 28, 2010

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QUESTIONS PRESENTED

Whether, under the Fourth Amendment to the United States Constitution, government agents who arrest and handcuff a partially dressed defendant at his front door are authorized to enter his home -- *without a search warrant or consent* -- and then search through his bedroom and closets, and seize property, based on a claim that they were obtaining clothing for him.[1]

Whether the protective sweep doctrine, which allows officers to conduct a quick and limited warrantless search incident to an arrest, of places where someone may be hiding, can be expanded to include closets in a bedroom that the officers enter to obtain clothing for a partially-clothed arrestee, especially where they had no reasonable belief that anyone was hiding anywhere in the house. U.S. Const. amend. IV.[2]

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[1] The scale and urgency of this question are amplified by a direct conflict between the Second Circuit and the Sixth Circuit on this issue.

[2] The Second Circuit's extension of the protective sweep exception to situations that are not incident to an arrest stands in sharp conflict with the Tenth Circuit.

PARTIES TO THE PROCEEDING

Petitioners in this Court, defendants-appellants below, are: Alex Rudaj, Prenka Ivezaj, Nardino Colotti, Angelo DiPietro, Nikola Dedaj, and Ljusa Nuculovic.

To avoid unnecessary duplication, Alex Rudaj, who is the only Petitioner in this submission, joins in any and all arguments made by his co-defendants in their separately filed petitions for certiorari, to the extent that they are not inconsistent with the relief sought herein. *See* Rule 12.4.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF AUTHORITIES vii

OPINIONS BELOW 1

JURISDICTION 2

CONSTITUTIONAL PROVISION INVOLVED 3

STATEMENT OF THE CASE 4

The Warrantless Search of Alex Rudaj's Bedroom 4

The Prosecutor Exploited the Evidence Seized from Alex Rudaj's Closet at Trial 5

The Second Circuit's Decision 7

REASONS FOR GRANTING CERTIORARI..... 8

I. POLICE OFFICERS SHOULD NOT BE PERMITTED TO CONDUCT A WARRANTLESS SEARCH IN A PARTIALLY DRESSED ARRESTEE'S BEDROOM FOR CLOTHING UNLESS THE ARRESTEE REQUESTS ADDITIONAL CLOTHING..... 9

The Court of Appeals Authorizes the Police to Enter an Arrestee's Home and Obtain Clothing for Him..... 11

The "Clothing Exception" Cannot be Justified as Part of the "Exigent Circumstances Exception" Because a Police Officer's Desire to Have an Arrestee Complete His Wardrobe is Not an Emergency..... 12

"The House of Every One is to Him as his Castle and Fortress, as Well as for his Defense against Injury and Violence as for his Repose" -- Sir Edward Coke..... 14

II. THE SECOND CIRCUIT'S CLOTHING EXCEPTION TO THE WARRANT REQUIREMENT CONFLICTS WITH THE LAW OF THE SIXTH, NINTH AND TENTH CIRCUITS..... 16

III. THE PROTECTIVE SWEEP DOCTRINE SHOULD NOT BE EXTENDED TO AUTHORIZE POLICE OFFICERS TO SEARCH THROUGH CLOSED CLOSETS IN CONNECTION WITH THEIR ENTRY INTO AN ARRESTEE'S BEDROOM TO OBTAIN CLOTHING THEY BELIEVE IS NECESSARY TO COMPLETE HIS ATTIRE 21

The Second Circuit's Expansion of the Protective Sweep Doctrine is in Direct Conflict with the Tenth Circuit..... 23

The Second Circuit's Rule Also Conflicts with this Court's Recent Decision in *Arizona v. Gant* 24

The Issues are Ripe for Resolution 25

CONCLUSION 27

APPENDIX

Appendix A: Second Circuit Opinion, Dated June 11, 2009 1

Appendix B: Second Circuit Summary Order, Dated June 11, 2009 27

Appendix C: District Court Opinion and Order Denying in Part Defendant's Motion to Suppress Evidence Seized During a Warrantless Search of His Home, Dated October 3, 2005 36

Appendix D: Second Circuit Order Denying Rehearing and Rehearing en banc, Dated August 31, 2009 62

TABLE OF AUTHORITIES

Cases

Arizona v. Gant,
129 S. Ct. 1710 (2009) 14, 24

Bui v. Massachusetts,
No. 95-9, *cert. denied*, 516 U.S. 861 (1995) 23

Coolidge v. New Hampshire,
403 U.S. 443 (1971) 10

Katz v. United States,
389 U.S. 347 (1967) 10

Maryland v. Buie,
494 U.S. 325 (1990) 21, 22, 23, 24

Miller v. United States,
No. 05-1042,
cert. denied, 547 U.S. 1206 (2006) 23

Minnesota v. Olson,
495 U.S. 91 (1990) 12

Payton v. New York,
445 U.S. 573 (1980) 10

Semayne's Case,
77 Eng. Rep. 194 (1604) 14

United States v. Butler,
980 F.2d 619 (10th Cir. 1992) 17, 19

United States v. Di Stefano,
555 F.2d 1094 (2d Cir. 1977) 11

United States v. Gould,
364 F.3d 578 (5th Cir.) (*en banc*),
cert. denied, 543 U.S. 437 (2004) 17

United States v. Gwinn,
219 F.3d 326 (4th Cir.),
cert. denied, 531 U.S. 1025 (2000) 16, 19

United States v. Kinney,
638 F.2d 941 (6th Cir.),
cert. denied, 452 U.S. 918 (1981) 18

United States v. McMullin,
576 F.3d 810 (8th Cir. 2009) 18

United States v. Miller,
430 F.3d 93 (2d Cir. 2005),
cert. denied, 547 U.S. 1206 (2006) 22

United States v. Nascimento,
491 F.3d 25 (1st Cir. 2007),
cert. denied, 128 S. Ct. 1738 (2008) 16, 19

United States v. Rodriguez-Rodriguez,
441 F.3d 767 (9th Cir. 2006),
cert. denied, 129 S. Ct 290 (2008) 18

United States v. Torres-Castro,
470 F.3d 992 (10th Cir. 2006),
cert. denied, 550 U.S. 949 (2007) 23

United States v. Waldner,
425 F.3d 514 (8th Cir. 2005) 23

United States v. Whitten,
706 F.2d 1000 (9th Cir. 1983) 18

United States v. Wilson,
306 F.3d 231 (5th Cir. 2002) 17

Vale v. Louisiana,
399 U.S. 30 (1970) 12

Constitutional Provision

U.S. Const. amend. IV ..... *passim*

Statutes

18 U.S.C. § 924(c) 6

28 U.S.C. § 1254(1) 2

Rules

Sup. Ct. R. 12.4 26

Other Authorities

Edward J. Loya, Jr., *Sweeping Away the Fourth Amendment, 1 Stan. J. Civ. Rts. & Civ. Liberties* 457 (Aug. 2005) 23

Marc May, *No Shirt, No Shoes, No Fourth Amendment Protection: The Fifth Circuit's Decision* in United States v. Wilson, 20 T.M. Cooley L. Rev. 99 (2003) 20

Leslie A. O'Brien, *Finding a Reasonable Approach to the Extension of the Protective Sweep Doctrine in Non-Arrest Situations*, 82 N.Y.U. L. Rev. 1139 (Oct. 2007) 23

Darrel C. Waugh, *Constitutional Law -- Developing Guidelines in Fourth Amendment "Clothing Cases" after United States v. Butler*, 16 W. New Eng. L. Rev. 289 (1994) 20

Petitioner Alex Rudaj respectfully requests that a writ of certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered on June 11, 2009.

OPINIONS BELOW

On October 3, 2005, Judge Denise L. Cote, in the Eastern District of New York, denied the Petitioner's motion to suppress evidence seized during a warrantless search of his home. *United States v. Rudaj*, 390 F. Supp. 2d 395 (E.D.N.Y. 2005). App.36-61.

A panel of the Second Circuit affirmed the convictions of the Petitioner and his co-defendants on June 11, 2009. The court issued a published decision, which addressed the suppression and other issues. *United States v. Ivezaj*, 568 F.3d 88 (2d Cir. 2009). App.1-26. The Second Circuit also issued an unpublished summary order, which focused on certain trial issues. App.27-35.

A timely petition for rehearing and suggestion for rehearing *en banc* was denied on August 31, 2009. App.62-63.

JURISDICTION

The Court of Appeals' judgment was entered on June 11, 2009. The Second Circuit denied rehearing by an order entered on August 31, 2009. The 90-day period for filing this petition for certiorari would have expired on November 29, 2009. However, on October 14, 2009, Justice Ruth Bader Ginsburg granted Application No. 09A343 extending the time to file until December 30, 2009. And, on December 16, 2009, Justice Ginsburg extended the time to file until January 28, 2010.

This Court's jurisdiction to review the Second Circuit's decision is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

The Warrantless Search of Alex Rudaj's Bedroom

In the early morning hours of October 26, 2004, Alex Rudaj answered the door to his home and a team of FBI agents arrested him on the front step. Petitioner was taken back inside, handcuffed, and held downstairs with his wife and young children while agents dashed upstairs and entered the couple's bedroom. Even though they did not have a search warrant, consent, or any reason to believe that anyone was hiding inside, the agents, acting pursuant to a preconceived plan, thoroughly searched the marital bedroom -- including its closets. Their hunt through Rudaj's bedroom and closets uncovered rifles and boxes of handgun ammunition, which the agents seized (A.23-36, 189).

Petitioner was subsequently charged with a variety of offenses, including gambling and extortion, as well as using and carrying a firearm in connection with the offenses. A chief part of the government's case was built on the boxes of ammunition that were seized, without a warrant, from dark corners of the bedroom closet during the search.

Alex Rudaj's motion to suppress evidence seized from his bedroom was denied by the district judge. The court held that the agents' entry into the upstairs bedroom was permissible to obtain clothing for Rudaj because he was wearing a t-shirt and boxer shorts when arrested by the agents. The trial judge also ruled that the agents were authorized to search through closed closets as part of a "protective sweep" incident to their warrantless entry into the bedroom, even though there was no reason to believe that anyone was hiding anywhere in the house (A.335-41; App.36-61).

The Prosecutor Exploited the Evidence Seized from Alex Rudaj's Closet at Trial

The prosecutor repeatedly exploited the guns and ammunition, as well as other items seized from the bedroom, by acknowledging in summation that the government's case was "established" through physical evidence obtained from searches, including those conducted of Rudaj's bedroom closets (Tr.9167).[3] The prosecutor also urged, "it appears that Rudaj still favors the 9-millimeter, since he had 9-millimeter ammunition in his closet on the day his house was searched" (Tr.9203)(emphasis supplied).

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[3] The judge admitted into evidence two rifles, a replica handgun and boxes of ammunition found in Alex Rudaj's closet, as well as two hunting rifles, money and master lock keys from the bedroom (A.334; App.56-57, 61).

Moreover, the prosecutor was able to argue that, as a result of the search, the jury need not rely on the testimony of the government's witnesses, which had been severely impeached, because of the "physical evidence" seized from the Rudaj bedroom (Tr.9320). She then proclaimed that

> although there were no handguns found in Rudaj's closet along with the rifles, there were partial boxes of handgun ammunition for two different sized handguns, a .357 and 9-millimeter, suggesting that Rudaj had either elsewhere in the house, at another location, or at some other time possessed these kinds of handguns (A.389).

In the face of this armory of weapons seized from his bedroom, the jurors, after deliberating for five full days, convicted Alex Rudaj. He was sentenced to imprisonment for 20 years, to which a consecutive sentence of seven years was bolted on for use of a firearm under 18 U.S.C. § 924(c). (A.431).

The Second Circuit's Decision

On appeal, the court noted that when Alex Rudaj answered the door, the agents "accompanied him inside, purportedly to get him dressed." The court held that it was permissible for the agents to go upstairs and enter his bedroom, while he was handcuffed downstairs, to find clothing for him and seize incriminating evidence in plain view (App.18-21).

However, the court declined to decide whether a protective sweep can be extended to justify the seizure of articles from an upstairs bedroom closet. *Id.* The panel believed such a determination was not necessary because the receipt in evidence of several rifles and boxes of ammunition, all taken from Petitioner's bedroom closet, was harmless. App.22-23.

REASONS FOR GRANTING CERTIORARI

In the history of ideas, the right to be left alone ranks as one of the highest. Thus, a central purpose of the Fourth Amendment is to safeguard that great right. Police officers should not have the unbridled discretion to rummage at will among an individual's personal effects without first obtaining a warrant. Nevertheless, the rule in the Second Circuit now permits agents to arrest a person outside his home and, if he is not fully dressed at the time, enter one of the most private of all places -- his bedroom -- and conduct a roaming search, *without a warrant or consent*, under the claim that they are obtaining clothing for him to wear while he is in custody.

And, through a harrowing bootstrapping process, agents in the Second Circuit are now empowered to *open closets* in an arrestee's bedroom under a claim that they are conducting a "protective sweep" in connection with their entry into the bedroom to obtain clothing. Thus, even though, as here, the defendant is handcuffed and held downstairs -- and *never asks for any clothing* -- the agents are still authorized to search his bedroom and closets.

The court of appeal's decision, upholding such a warrantless entry and search of a bedroom, pursuant to a "clothing exception" to the Fourth Amendment's warrant requirement, stands in stark conflict with an authoritative decision from the Sixth Court and is bound to have profound consequences concerning the protections provided by the Constitution. Furthermore, the Second

Circuit's expansion of the protective sweep exception to situations that are not incident to an arrest conflicts directly with the Tenth Circuit.

This case, which involves two critical Fourth Amendment issues upon which *the circuits are radically divided*, presents a perfect platform for resolving recurring issues that are bound to continue to plague the Court.

I. POLICE OFFICERS SHOULD NOT BE PERMITTED TO CONDUCT A WARRANTLESS SEARCH IN A PARTIALLY DRESSED ARRESTEE'S BEDROOM FOR CLOTHING UNLESS THE ARRESTEE REQUESTS ADDITIONAL CLOTHING

The Fourth Amendment mandates that before the police can enter a person's home, a neutral magistrate must weigh the competing considerations of law enforcement against the right of privacy afforded any person under the Fourth Amendment. This key constitutional virtue, often overlooked by law enforcement officers, ensures that only through the intervention of an impartial judicial officer can these rival interests be fairly adjusted.

Because of the exalted place the right of privacy occupies in our hierarchy of constitutional values, "searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment -- subject only to a few specifically established and well-delineated exceptions."[4]

Law enforcement officers have been steadily chipping away at the foundation of this constitutional bulwark that safeguards our homes from warrantless searches. This erosion of the Fourth Amendment is being accomplished through exceptions to the warrant requirement, which have never been approved by this Court.[5]

Perhaps the most alarming "exception," which urgently warrants review by the Court, is the so-called "clothing exception," which allows an officer's warrantless entry into a home to obtain clothing for a partially dressed person under arrest.

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[4] *Katz v. United States*, 389 U.S. 347, 357 (1967) (footnote omitted). *See also Payton v. New York*, 445 U.S. 573, 586 (1980).

[5] The *government* bears the "heavy burden" of proving that the search was reasonable under the Fourth Amendment. *And*, if they claim that an *exception* to the warrant requirement applies, they must prove the need for invoking that imperative. *See Coolidge v. New Hampshire*, 403 U.S. 443, 474-75 (1971).

This exemption, which *allows wide discretion to police officers*, does *not* fall within any of the "specifically established" and "well-delineated" exceptions authorized by this Court. Instead, the courts of appeals, which are drastically divided on this issue, have created a critical and highly suspect exception, which, unless corrected, will seriously curtail the traditional protection afforded the home.

The Court of Appeals Authorizes the Police to Enter an Arrestee's Home and Obtain Clothing for Him

Despite the constitutional mandates of the Fourth Amendment, the court of appeals has approved the warrantless entry into a person's home, and search of his bedroom, under the pretense that the officers are retrieving clothing for him. That simple statement suggests the awful solemnity of the occasion that requires this Court's intervention.

The rule in the Second Circuit is chilling: Officers can now enter a defendant's home when the defendant is arrested in a state of undress. And, once inside the home and bedroom, the officers can seize, at will, any evidence that they observe in plain view.[6]

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[6] App. 20-21, citing *United States v. Di Stefano*, 555 F.2d 1094, 1101 (2d Cir. 1977).

However, the protections afforded by the Fourth Amendment do not disappear merely because a defendant is not wearing a three-piece suit when the police arrive. Moreover, absent consent, entry into private spaces -- such as the marital bedroom -- should not be based on law enforcement officers' desire to complete an arrestee's wardrobe!

The "Clothing Exception" Cannot be Justified as Part of the "Exigent Circumstances Exception" Because a Police Officer's Desire to Have an Arrestee Complete His Wardrobe is Not an Emergency

The government may urge that the clothing exception has its foundation in the "exigent circumstances exception," which authorizes a warrantless search where there is a need to act quickly and it is impractical for the police to obtain a warrant. *See, e.g., Vale v. Louisiana*, 399 U.S. 30, 35 (1970). Those types of exigent circumstances have been limited to *true emergencies*, such as "hot pursuit of a fleeing felon, or imminent destruction of evidence," or the "need to prevent a suspect's escape, or the risk of danger to the police or to other persons inside or outside the dwelling." *See Minnesota v. Olson*, 495 U.S. 91 (1990). No such acute or life-threatening circumstances are presented by a police officer's wish to obtain additional clothing for a defendant.

Furthermore, absolutely no standards exist as to *when* an arrestee is sufficiently underdressed as to justify a warrantless intrusion into his bedroom. For example, is a coat required? What about a sweater? Shoes? Socks? A jacket and tie? Raincoat? Moreover, is the Fourth Amendment less revered in the winter, when a police officer may believe that the arrestee should be wearing a sweater? What about gloves and a hat on a snowy day?

Such considerations may seem farfetched, but they are very real. Alex Rudaj was wearing a t-shirt and boxer shorts when a team of federal agents executed an arrest warrant at his home at 6:30 in the morning.

If this unprecedented decision from a prominent circuit is allowed to stand uncorrected, then the sanctity of homes across the nation will be at grave risk because it authorizes the unlimited rummaging by federal agents through an arrestee's bedroom and closets under the pretext that the agents were looking for clothing that a defendant could wear to his arraignment.

What is worse, the broad discretion given to police officers actually encourages them to arrest defendants at hours when they would most likely be in their bedclothes, which would empower the police to search homes without obtaining a search warrant. This, obviously, would have a profound effect on the fundamental protections of the Fourth Amendment.

However, if the need to obtain clothing for a partially dressed defendant is to become an "established" exception to the Fourth Amendment's warrant requirement, then we urge, most respectfully, *this* Court should make that determination and resolve this recurring issue definitively once and for all.

"The House of Every One is to Him as his Castle and Fortress, as Well as for his Defense against Injury and Violence as for his Repose" – Sir Edward Coke

These words, uttered by Sir Edward Coke, Chief Justice of the King's Bench, in 1604, are just as true today as they were back then.[7] Moreover, nowhere in the world is the inviolability of the home more protected than in the United States. This high regard for privacy can be traced back to the 18th Century, when British soldiers searched, at will, the homes of our founding fathers.[8]

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[7] *Semayne's Case*, 77 Eng. Rep. 194, 195 (1604).

[8] To "determine what is an 'unreasonable' search within the meaning of the Fourth Amendment, we look first to the historical protections the Framers sought to preserve." *See Arizona v. Gant*, 129 S. Ct. 1710, 1724 (2009) (Scalia, J., concurring).

Distress over unwarranted intrusions into the privacy of citizens was a major cause of the Revolutionary War. And, in due course, the Framers took infinite pains to ensure that the sanctity of our homes was *constitutionally* guaranteed by including that indispensable safeguard in our Bill of Rights.[9]

This short historical background serves as a reminder that the protections of the Fourth Amendment are as essential now as they were back in colonial times. Today *all* Americans should feel safe in the knowledge that the Constitution protects them from *unwarranted* searches and seizures.

However, under the rule in the Second Circuit, the government no longer needs to meet its heavy burden of establishing any exigencies to overcome the warrant requirements of the Fourth Amendment. Instead, now, federal agents may enter the home of a defendant, who is under arrest, to ensure that he is properly attired before leaving his residence. And, they may now search through his bedroom at will without bothering to fulfill the constitutional requirements of probable cause, as well as the other prerequisites that accompany a search warrant.

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[9] The remarkably plain language, adopted by the Framers of the Constitution, guarantees to the people the right to be secure in their homes against unreasonable searches and seizures.

II. THE SECOND CIRCUIT'S CLOTHING EXCEPTION TO THE WARRANT REQUIREMENT CONFLICTS WITH THE LAW OF THE SIXTH, NINTH AND TENTH CIRCUITS

The need for this Court's resolution of these important constitutional issues is further heightened since circuit courts across the country are distinctly *divided* on the very issues presented by this case. Significantly, the First, Fourth, Fifth and Tenth Circuits join with the Second Circuit and permit officers to enter a home, without a warrant or consent from the defendant, to retrieve clothing for an inadequately dressed individual in police custody.

For instance, the First Circuit held, in *United States v. Nascimento,* 491 F.3d 25, 50 (1st Cir. 2007), *cert. denied*, 128 S. Ct. 1738 (2008), it was proper for the police to escort the defendant, who was clad only in his underwear, into his bedroom to retrieve clothing, and the police may conduct a brief search of the closet where the clothing is located. Similarly, in *United States v. Gwinn,* 219 F.3d 326 (4th Cir.), *cert. denied*, 531 U.S. 1025 (2000), the court found no Fourth Amendment violation where arresting officers entered a defendant's home to get a shirt and shoes for him to wear. And, a search of the shoe retrieved, which contained a pistol, prior to giving it to the defendant was proper.

Similarly, in *United States v. Wilson*, 306 F.3d 231 (5th Cir. 2002), the Fifth Circuit determined that the need to get clothes for a suspect, who was arrested on the sidewalk wearing only boxer shorts, can constitute exigent circumstances permitting a warrantless entry into a suspect's home or room.[10] Furthermore, once in the home, the police can search individuals found inside.

Finally, in *United States v. Butler*, 980 F.2d 619, 621-22 (10th Cir. 1992), the Tenth Circuit found that police officers were permitted to enter a defendant's home to retrieve shoes where, based on extensive litter, including broken glass, on the ground, there is a significant and legitimate threat to the defendant's health and safety posed by his bare feet.

In stark contrast, the Sixth, Eighth and Ninth Circuits have unequivocally held that the state of a defendant's dress, who was arrested outside the home, does *not* create any exigency to permit a warrantless entry into the defendant's home.

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[10] Overruled on other grounds, *United States v. Gould*, 364 F.3d 578 (5th Cir.) (*en banc*), *cert. denied*, 543 U.S. 437 (2004).

For example, in *United States v. Kinney*, 638 F.2d 941 (6th Cir.), *cert. denied*, 452 U.S. 918 (1981), the court held that where the defendant was arrested on the porch of his apartment building and the only other person believed to be involved in the offense was already in custody, there was neither a necessity nor exigent circumstances authorizing the warrantless entry into the defendant's apartment, even though the defendant was only partially dressed and it was March in Ohio.

Moreover, in *United States v. McMullin*, 576 F.3d 810, 817 (8th Cir. 2009), a defendant's lack of a shirt at the time of arrest did not constitute exigent circumstances to permit a warrantless entry into the home to search for proper clothing. And, in *United States v. Whitten*, 706 F.2d 1000, 1016 (9th Cir. 1983),[11] the court found that absent a "specific request" for clothing or consent to enter, *officers may not go into the hotel room of a defendant who was arrested in his underwear in the doorway.*

In addition, the Second Circuit's broad approach, which fails to consider the *pretextual* nature of the officers' conduct, actually conflicts with the more cautious approach embraced by the other circuits that have adopted a clothing exception. For example, the Fourth Circuit is careful to warn "against using a clothing exception as a cover for entries made for other purposes." The court stressed that an "essential premise" for its application of the clothing exception is the fact that

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[11] Overruled on other grounds as recognized by *United States v. Rodriguez-Rodriguez*, 441 F.3d 767 (9th Cir. 2006), *cert. denied*, 129 S. Ct 290 (2008).

nothing in the record suggests that the officer's reason for the reentry into the defendant's home was pretextual or that he acted in bad faith. *Gwinn*, 219 F.3d at 335.

Similarly, the First Circuit upheld the warrantless entry because the police neither manipulated the situation nor used the defendant's state of undress as a pretext to carry out an otherwise impermissible search. *Nascimento*, 491 F.3d at 50. And, in *Butler*, the Tenth Circuit noted that the police intrusion was limited to getting the defendant clothing. 980 F.2d at 621-22.

This stance against the pretextual application of the clothing exception clashes with the Second Circuit's decision in the current case. Here, the record established that prior to arriving at Rudaj's home the government had assembled a fully outfitted search and seizure team to hunt through the home for evidence. This squad included (1) a designated agent in charge of all seizures; (2) an agent assigned to photograph *all places searched* and to take pictures of *all items seized*; (3) agents assigned to search the premises, as well as (4) agents designated to stay with Alex Rudaj's wife and children while the search was implemented (A.228, 243, 246).[12]

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[12] Agent Gregory Massa, the designated photographer, knew that the agents were going to be in the Rudaj home "for a period of time" (A.241).

The pretextual nature of the search is further supported by the fact that (1) Alex Rudaj remained handcuffed downstairs during the entire search; (2) no agent ever accompanied him to the bedroom to pick out any clothing; (3) no agent ever selected any clothing; and, significantly, (4) the agent in charge *did not even know how Rudaj ultimately obtained clothing* to wear over his shorts and T-shirt (A.191, 192, 246).

This issue is of considerable importance to judges, prosecutors and defense attorneys who have been calling for its clarification. Not surprisingly, this constitutional question has spawned debate across the nation. And, legal scholars have noted that circuit court decisions that endeavor to carve out a "clothing exception" do "little more than *add to the confusion*" surrounding the uncertain standards of what warrantless searches are reasonable. *See, e.g.*, Marc May, *No Shirt, No Shoes, No Fourth Amendment Protection: The Fifth Circuit's Decision in United States v. Wilson*, 20 T.M. Cooley L. Rev. 99, 100 (2003) (emphasis supplied).[13]

This clear split among the circuit courts adds force to the magnitude of this debate. Furthermore, without resolution, this issue will continue to fester and generate more conflicts.

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[13] *See also* Darrel C. Waugh, *Constitutional Law -- Developing Guidelines in Fourth Amendment "Clothing Cases" after United States v. Butler*, 16 W. New Eng. L. Rev. 289 (1994).

Now is the time for this Court to resolve this growing conflict of authority. And, this case provides the Court with a perfect platform to formulate that resolution.

III. THE PROTECTIVE SWEEP DOCTRINE SHOULD NOT BE EXTENDED TO AUTHORIZE POLICE OFFICERS TO SEARCH THROUGH CLOSED CLOSETS IN CONNECTION WITH THEIR ENTRY INTO AN ARRESTEE'S BEDROOM TO OBTAIN CLOTHING THEY BELIEVE IS NECESSARY TO COMPLETE HIS ATTIRE

This case also presents questions left unanswered by this Court in *Maryland v. Buie*, 494 U.S. 325 (1990), on which there is another clear conflict among the circuits, concerning the scope of the "protective sweep" exception to the Fourth Amendment's warrant requirement.

In *Buie*, the Court held that "as an incident" to an arrest, officers may "look in closets and other spaces immediately adjoining the place of arrest from which an attack could immediately be launched." 494 U.S. at 334. And, a more wide-ranging sweep may only be conducted if the officers have "articulable facts which would warrant a reasonably prudent officer in believing that the area to be swept harbors an individual posing a danger to those on the arrest scene." *Id.*

The *Buie* doctrine, which was *limited to searches incident to an arrest*, has now been radically enlarged to authorize officers to open closets in an upstairs bedroom -- far from where the handcuffed defendant is held in police custody -- as a "protective sweep" *incident to the agent's separate entry into the bedroom to obtain clothing for the defendant* (App.51-57). *See also United States v. Miller*, 430 F.3d 93 (2d Cir. 2005), *cert. denied*, 547 U.S. 1206 (2006). Thus, the Second Circuit has broadened the scope of the narrow confines of the protective sweep doctrine developed in *Buie*.

The approach in this case is particularly unsettling where the district court expressly found that the agents could not justify their search of the bedroom's closets as a protective sweep incident to Alex Rudaj's arrest because (1) he was handcuffed downstairs and (2) the agents had *no* "articulable facts that support an inference that the area to be swept harbors an individual posing danger to those present" (App.44-45).

Nevertheless, despite that unequivocal finding, the court concluded that the closets were properly searched as a protective sweep incident to the agents' "separate legal entry" into the Rudaj residence to obtain clothing pursuant to the Second Circuit's "clothing exception" (App.46-48).

The Second Circuit's Expansion of the Protective Sweep Doctrine is in Direct Conflict with the Tenth Circuit

Significantly, other courts -- including the Eighth and Tenth Circuits -- have rejected the Second Circuit's approach and recognized that protective sweeps are only permitted incident to an arrest. *See, e.g., United States v. Torres-Castro*, 470 F.3d 992, 996 (10th Cir. 2006), *cert. denied*, 550 U.S. 949 (2007) (noting the conflict among the circuits); *United States v. Waldner*, 425 F.3d 514 (8th Cir. 2005) (declining the government's invitation to extend *Buie* further).

Not surprisingly, efforts to inflate the parameters of *Buie*'s protective sweep doctrine have caused considerable conflicts across the nation.[14] And, as a consequence, this Court is routinely being burdened with petitions from federal and state defendants urging a final resolution of this recurring question.[15]

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[14] *See* Leslie A. O'Brien, *Finding a Reasonable Approach to the Extension of the Protective Sweep Doctrine in Non-Arrest Situations*, 82 N.Y.U. L. Rev. 1139, 1139 (Oct. 2007) (noting the discord among the Circuits and that this Court "has not clarified whether the protective sweep doctrine applies where there is no arrest"); Edward J. Loya, Jr., *Sweeping Away the Fourth Amendment*, 1 Stan. J. Civ. Rts. & Civ. Liberties 457, 458 (Aug. 2005) (confirming that the "Circuits are now split on this question").

[15] *See, e.g., Miller v. United States*, No. 05-1042, *cert. denied*, 547 U.S. 1206 (2006) ("[d]oes the Fourth Amendment permit a protective sweep where the police are in someone's home for reasons other than making an arrest?"); *Bui v. Massachusetts*, No. 95-9, *cert. denied*, 516 U.S. 861 (1995) ("whether police

The Second Circuit's Rule Also Conflicts with this Court's Recent Decision in *Arizona v. Gant*

The issues presented are further amplified by the recent decision in *Arizona v. Gant*, 129 S. Ct. 1710 (2009), where the Court held that it was unreasonable for police officers to search a defendant's car while he was being held, in handcuffs, outside of the vehicle. Thus, the officers had to demonstrate some threat to their safety in order to justify a warrantless search of the vehicle.

Under the Second Circuit's approach, however, a defendant's *home* may be searched -- while he is handcuffed downstairs -- without any showing that the officers are exposed to any harm! To the contrary, the trial judge specifically found that there was no articulable basis to believe that any portion of the Rudaj house harbored an individual posing a danger to the agents (App.45).

Such a jarring result -- which exposes our homes to greater risk than our cars -- cannot be reconciled especially since "a motorist's privacy interest in his vehicle is *less substantial than in his home*." *Gant*, 129 S. Ct. at 1720.

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officers' warrantless protective sweep of a home -- without any arrest and including areas where no person could be concealed -- violates the Fourth Amendment as construed in *Maryland v. Buie*, ... as to which the courts of appeals are in conflict").

Moreover, the sheer scale of these issues is evidenced by the fact that there are 8.6 million homes in the Second Circuit that may now be searched pursuant to far-reaching expansions of the protective sweep exception to the Fourth Amendment's strict warrant requirements!

The Issues are Ripe for Resolution

The issues presented by this case are ripe for resolution despite the court of appeals' mistaken belief that the seizure of an array of guns, ammunition and other evidence, which the agents unlawfully took from bedroom closets, can be excused under the doctrine of "harmless error" (App.22).

The principal virtue of the Fourth Amendment is in combating *arbitrary police action involving intrusions* into the sanctity of one's home. Every member of the public has a stake in seeing that the protections of the Fourth Amendment are enforced. As such, here, Petitioner *and* the *public* are entitled to have this Court determine whether the police acted unlawfully in entering Alex Rudaj's home, without a search warrant or consent, and conducting a search of his bedroom closets.

The decision in this case, if left uncorrected, is bound to foment confusion in this important field of law where certainty is critical to guide the actions of police officers who obtain a large measure of their evidence through searches and seizures. Furthermore, a rule, which, in effect, exonerates a Fourth Amendment violation by attempting to

inoculate the fruits of the illegal search and seizure with the antidote of harmless error defeats the very purpose of the exclusionary rule, which is to deter such unconstitutional practices of the police.

Finally, our greatest fear is that the mobility of the "protective sweep" -- especially taken in combination with the Second Circuit's "clothing exception" -- will be so easily manipulated as to become an "Open Sesame" to all of our bedrooms and closets. Moreover, the government will continue to abuse the protective sweep doctrine to sweep away the warrant requirements of the Fourth Amendment -- and, in that way, the privacy rights of all people will be placed at grave risk.

Alex Rudaj joins in any and all arguments made by his co-defendants in their petitions for certiorari to the extent that they are not inconsistent with the relief sought herein. *See* Rule 12.4.

CONCLUSION

For all these reasons, as well as those advanced in the petitions of Alex Rudaj's co-defendants, the Petitioner prays that a writ of certiorari issue to review the Second Circuit's opinion in this case.

January 28, 2010

Respectfully submitted,

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INDEX TO APPENDICES

APPENDIX

Appendix A: Second Circuit Opinion, Dated June 11, 2009 1

Appendix B: Second Circuit Summary Order, Dated June 11, 2009 27

Appendix C: District Court Opinion and Order Denying in Part Defendant's Motion to Suppress Evidence Seized During a Warrantless Search of His Home, Dated October 3, 2005 36

Appendix D: Second Circuit Order Denying Rehearing and Rehearing en banc, Dated August 31, 2009 62

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

August Term, 2007

(Argued: May 13, 2008 Decided: June 11, 2009)

Docket Nos. 06-3112-cr (L), 06-3275-cr (CON), 06-3296-cr (CON), 06-3339-cr (CON), 06-3372-cr (CON), 06-5908-cr (CON)

UNITED STATES OF AMERICA,

Appellee,

-v.-

PRENKA IVEZAJ, NARDINO COLOTTI, ALEX RUDAJ, ANGELO DIPIETRO, NIKOLA DEDAJ AND LJUSA NUCULOVIC*

Defendants-Appellants.

* The Clerk of Court is directed to amend the official caption as indicated.

Before:

FEINBERG, MINER, and B.D. PARKER, *Circuit Judges*.

Defendants appeal from judgments of conviction entered in the United States District Court for the Southern District of New York (Cote, J.) for racketeering, RICO conspiracy, conspiracy to conduct an illegal gambling business, and using and carrying firearms during and in relation to a crime of violence. Affirmed.

RICHARD A. GREENBERG (Steven Y. Yurowitz, *on the brief*), New York, N.Y., *for Defendant-Appellant Prenka Ivezaj*.

RICHARD WARE LEVITT (Yvonne Shivers, *on the brief*), New York, N.Y., *for Defendant-Appellant Nardino Colotti*.

HAROLD PRICE FAHRINGER (Erica T. Dubno, *on the brief*), New York, N.Y., *for Defendant-Appellant Alex Rudaj*.

JONATHAN SVETKEY, New York, N.Y., *for Defendant Appellant Angelo DiPietro*.

DIARMUID WHITE (Brendan White, *on the brief*), New York, N.Y., *for Defendant-Appellant Nikola Dedaj*.

JOHN BURKE, Brooklyn, N.Y., *for Defendant-Appellant Ljusa Nuculovic*.

JENNIFER G. RODGERS, Assistant U.S. Attorney (Timothy J. Treanor, Benjamin Gruenstein & Jonathan S. Kolodner, Asst. U.S. Attorneys, *on the brief*), *for* Michael J. Garcia, United States Attorney for the Southern District of New York, New York, N.Y., *for Appellee.*

BARRINGTON D. PARKER, *Circuit Judge:*

Defendants-Appellants Prenka Ivezaj, Nardino Colotti, Alex Rudaj, Angelo DiPietro, Nikola Dedaj, and Ljusa Nuculovic (collectively "appellants" or "defendants") appeal from judgments of conviction entered in the United States District Court for the Southern District of New York (Cote, *J.*) on charges arising from their involvement in a racketeering enterprise. We affirm the convictions for the reasons stated in this opinion and in a companion summary order.

BACKGROUND

The indictment charged, and the trial evidence, considered in the light most favorable to the government, established that the appellants were members of the Rudaj Organization (the "Organization"), a violent Albanian racketeering organization based in New York City and Westchester County. The government alleged that the Organization sought to challenge, through violence and intimidation, the primacy of the New York City area's traditional organized crime families. Gambling was a particularly active area of competition. After operating illegal gambling

businesses in the Bronx and Westchester County, the Rudaj Organization forcibly took over several illegal gambling clubs in Astoria, Queens and required other bars and restaurants to install and use its gambling machines. In addition to gambling, the Organization engaged in a variety of other illegal conduct, including extortion, loansharking, and bank fraud.

These activities generated an indictment initially containing twenty-one counts, fifteen of which were ultimately presented to the jury. We address here only those relevant to our opinion. Count One charged all of the appellants with substantive racketeering, and Count Two charged them with racketeering conspiracy. *See* 18 U.S.C. § 1962(c), (d). To establish the pattern of racketeering activity charged in Count One, the government alleged that the defendants engaged in a series of predicate acts, many of which were also charged as separate counts. Of these, Racketeering Acts Four and Five are at the center of our analysis. Racketeering Act Four alleged that Rudaj, Dedaj, Ivezaj, Nuculovic, and DiPietro attempted to extort, conspired to extort, and extorted control of an illegal gambling operation from Fotios Dimopoulos and Antonios Balampanis. Racketeering Act Five charged Rudaj, Colotti, Dedaj, Ivezaj, Nucolovic, and DiPietro with extorting and conspiring to extort the owners of a gambling business, known as "Soccer Fever," in violation of New York's extortion laws. *See* N.Y. Penal Law §§ 105.13, 155.05, 155.40. All defendants were also charged in Count Thirteen with using and carrying firearms in aid of racketeering. *See* 18 U.S.C. §§ 924(c)(1)(A)(ii) & 2.

The government's evidence included the testimony of investigating officers, various cooperating witnesses and victims, consensual tape recordings, recorded conversations from Title III interceptions, as well as physical evidence seized during various searches. At the conclusion of the trial, the district court dismissed several of the counts. The defendants were then convicted on all but one of the remaining counts (but not all of the predicate racketeering acts) and were sentenced to substantial prison terms.

The defendants appeal on various grounds. We decide here that control over illegal intangible property-here a gambling operation-is "property" that can be "delivered" under New York's extortion statute. We also conclude that Balampanis was a proper "victim" of an inchoate extortion offense under New York law; that Count One qualified as a "crime of violence" under 18 U.S.C. § 924(c); and that the district court did not err in applying a role enhancement to Ivezaj's sentence. Additionally, we decide that the admission of evidence seized from Rudaj's home, if error at all, was harmless. Accordingly, we affirm the judgments.

DISCUSSION

I. *Whether Illegal Intangible Goods Qualify as "Property" under New York Extortion Law*

Defendants[1] challenge their convictions on Racketeering Acts Four and Five, which alleged violations of New York's extortion laws.[2] Their main contention is that the alleged acts are legally insufficient to sustain a conviction because control over illegal gambling does not constitute "property" under New York's extortion law and, even if it did, no property was "delivered" as is required by the statute. We review *de novo* the grant or denial of a Rule 29 motion for judgment of acquittal. *United States v. Eppolito,* 543 F.3d 25, 45 (2d Cir. 2008); *United States v. Florez,* 447 F.3d 145, 154 (2d Cir. 2006).

---

[1] Several of the defendants simply join in the arguments of their co-defendants where there is no inconsistency between those arguments and the arguments made in their own briefs. We use the general term "defendants" to avoid confusion.

[2] State law crimes such as extortion can constitute racketeering acts under RICO. 18 U.S.C. § 1961(1)(A) includes "any act or threat involving ... extortion, ... which is chargeable under State law and punishable by imprisonment for more than one year" in its definition of "racketeering activity."

As proof of Racketeering Act Four, the government established that the Organization, through violence and intimidation, wrested control of certain illegal gambling operations in Astoria from the Lucchese Crime Family. In June of 2001, members of the Rudaj Organization seriously assaulted Antonios Balampanis, a close companion of Fotios Dimopoulos, a Lucchese family associate who supervised their Astoria operations. Dimopoulos later told Balampanis that his beating had been intended as "a message" for Dimopoulos, and Dimopoulos never returned to gambling clubs in Astoria following the assault.

Racketeering Act Five related to the Rudaj Organization's operation of "barbut," a lucrative gambling activity in Astoria. In early August 2001, a Gambino associate, Tommy Napoli, opened a gambling club known as "Soccer Fever" that directly competed with barbut and was operated by Mikhail Hirakis. On the club's first night, Soccer Fever brought in approximately $8,000. The next night, approximately fifteen members of the Organization, including the six defendants, stormed the club with guns on the instruction of Rudaj and broke up the game. They intended to assault Napoli, but when they were unable to locate him, they assaulted Hirakis instead. Rudaj intimidated the club's patrons: "I don't want to see nobody here. If I see [you] one more time, I swear to God ... I beat you ... one by one. I eat you up.... It's closed." That was the end of Soccer Fever, and the Organization subsequently extended its control of illegal gambling in Astoria.

Under New York law, "[a] person obtains property by extortion when he compels or induces another person to deliver such property to himself or to a third person by means of instilling in him a fear that, if the property is not so delivered, the actor or another will ... [c]ause physical injury to some person in the future...." N.Y Penal Law § 155.05(2)(e)(1). "Property" is defined as "any ... personal property ... or any article, substance or thing of value ... which is provided for a charge or compensation." N.Y. Penal Law § 155.00(1).

The district court instructed the jury that "[t]he term property includes not only money and other physical or tangible things, but also any valuable right considered as a source or element of wealth." Moreover, "[t]he pursuit of a business, including the solicitation of customers necessary to the conduct of the business, is considered property, as are the proceeds of a business." Further, the court charged that "[i]t does not matter ... if the victim's initial acquisition or possession of tangible property was illegal, or if the business in which the victim is engaged is illegal. Illegally obtained assets and businesses conducted in violation of the law can constitute property."

While acknowledging that an intangible good may constitute property under New York law, defendants challenge this instruction on the ground that "control over illegal gambling" does not constitute property because a legal right to the alleged property is required before it can qualify as property under New York law. They contend that because the Luccheses and the various victims had no legal right to operate an illegal gambling

business, Racketeering Acts Four and Five did not sufficiently allege extortion.

We agree with the district court that an illegal gambling business can constitute property under New York law. The statute broadly defines "property" as "any ... personal property, real property ... substance or thing of value ... which is provided for a charge or compensation." N.Y. Penal Law § 155.00(1). Illegal intangible property, such as that contemplated here, fits within this expansive definition: control over illegal gambling is a "thing of value" which is "provided for ... compensation."

This understanding is consistent with the New York courts' recognition that intangible property as well as illegal tangible property are covered by the statute. For example, in *People v. Garland,* 69 N.Y.2d 144, 147 (1987), the New York Court of Appeals held that intangible goods-in that case, a tenant's right to occupy an apartment-could constitute "property," noting that "an interest need not be transferable to constitute 'property' [under N.Y. Penal Law § 155.00(1)]." *See also People v. Spatarella,* 34 N.Y.2d 157, 162 (1974) ("property" includes intangible goods, because "[s]urely the extortionist's demand for the business itself, or a part of it, is, if anything, more egregious than the demand simply for money"); *People v. Dixson,* 798 N.Y.S.2d 659, 664 (Crim. Ct. 2005). Under New York law, illegal tangible goods can also constitute "property." *See People v. Hardwick,* 524 N.Y.S.2d 798, 800 (App. Div. 1988) ("That it was unlawful for [the victims] to possess the narcotics is no defense to the defendant's unlawful taking of

them."); *People v. Izzo*, 409 N.Y.S.2d 623, 624 (Crim. Ct 1978) ("Ownership ... is a broad concept. Even a person who has himself stolen property has a right of possession superior to that of a third person who wrongfully takes it from him ...."); *see generally People ex rel. Short v. Warden of City Prison*, 130 N.Y.S. 698, 700 (App. Div. 1911) ("'[P]roperty'" is "intended to embrace every species of valuable right and interest, and whatever tends in any degree, no matter how small, to deprive one of that right, or interest, deprives him of his property."). Given such an expansive definition of "property," and the absence of any legality requirement in the statute, we see no indication that the New York legislature intended that illegal intangible assets could not be the subject of extortion.

Our jurisprudence interpreting the Hobbs Act also supports our analysis here. The Hobbs Act was modeled on the New York extortion statute, and New York courts have often looked to Hobbs Act jurisprudence for guidance. *See, e.g., People v. Capparelli*, 603 N.Y.S.2d 99, 104 n. 1 (Sup. Ct. 1993) (citing cases for the proposition that "New York appellate courts frequently refer to federal cases interpreting the Hobbs Act"); *see also Scheidler v. Nat'l Org. for Women, Inc.*, 537 U.S. 393, 403 (2003) ("Congress used two sources of law as models in formulating the Hobbs Act: the Penal Code of New York and the Field Code, a 19th-century model penal code."). In *United States v. Gotti*, 459 F.3d 296 (2d Cir. 2006), we reviewed our Hobbs Act precedents following the Supreme Court's decision in *Scheidler*, and we reaffirmed that "intangible property rights can qualify as

extortable property under the Hobbs Act. ..." 459 F.4d at 323. Moreover, we held that such rights "can qualify as extortable property under the Hobbs Act regardless of whether its exercise, transfer, or sale would be legal." *Id.* at 325. Importantly, we did not "see any basis for imposing a 'legality' requirement on the extortion of both tangible and intangible property." *Id.* at 326.

Defendants argue that even if control over an illegal gambling business could be extorted under New York law, defendants did not "obtain" this property because it was never "delivered" to them. *See* N.Y. Penal Law § 155.05(2)(e). We find this interpretation imaginative but overly literal and, in any event, not supported by the law. Under New York law, an intangible property right-which by definition cannot be "delivered" in the traditional sense-can be extorted. *See Garland,* 69 N.Y.2d at 146-47; *Spatarella,* 34 N.Y.2d at 162 ("property" under the extortion statute includes intangible rights). For similar reasons, we reject defendants' argument that they could not have transferred or delivered control over a criminal business "in any sense that the law protects." Again, it is established under New York law that illegal goods, such as drugs or drug proceeds, which are not capable of lawful transfer, fall under the extortion statute. *See Hardwick,* 524 N.Y.S.2d at 800.

II. *Whether Balampanis is a Victim of Inchoate Extortion Offenses Under New York Law*

The defendants also argue that "[w]hatever the reason for Balampanis's beating, he could not be the actual or intended 'victim' of an inchoate extortion offense." New York law requires that the victim of a substantive extortion offense be an "owner" of the extorted property. Defendants focus on the use of the word "owner" in the statute, which provides that "[w]hen property is taken, obtained or withheld by one person from another person, an 'owner' thereof means any person who has a right to possession thereof superior to that of the taker, obtainer or withholder." N.Y. Penal Law § 155.00(5). They contend that the government's proof and the court's charge were insufficient because the "victim" of extortionate conduct must own or control the property extorted, and Balampanis did neither.

The district court rejected the defendants' arguments. On this count, in response to a jury request on this issue,[3] the court instructed the jury as follows:

> THE COURT: Racketeering Act Four charges three crimes. To find that the crime of extortion was committed, you must find that at least Foti Dimopoulos was a victim of the extortion.

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[3] The jury sent a note during deliberations asking whether "the victims, Foti Dimopoulos and Tony Balampanis, [should be] looked at individually or lumped together as victims[.]"

> With respect to the crimes of attempted extortion and conspiracy to commit extortion, you must find that at least one of the two identified victims in Racketeering Act Four, Foti Dimopoulos and Tony Balampanis, was an intended victim of those crimes.
>
> You may also consider or lump together the evidence regarding both identified victims to decide whether the government has proven any one of these three charges; extortion, attempted extortion or conspiracy to commit extortion. Remember in this context that it is a crime to use force or violence against one person to obtain property from another with that second person's consent by instilling fear in that second person, as I have explained in my charge.

Given the tripartite nature of Racketeering Act Four-which alleged that several of the defendants engaged in extortion conspiracy, substantive extortion, and attempted extortion and that "any one of which ... constitutes the commission of Racketeering Act Four"-we find no error in the court's instructions. The district judge properly charged that Balampanis could be a victim for the attempt and conspiracy offenses. The fact that Balampanis was not actually the owner does not matter for these offenses; rather, the key inquiry for the jury in an attempted extortion charge is whether the defendants *thought* he was. *See People v. Davis*, 72 N.Y.2d 32, 36 (1988) ("[F]actual impossibility will not provide a defense to a prosecution for attempted intentional acts. ..."); *People v. Gardner*, 144 N.Y. 119, 124-26 (1894)

(factual impossibility is no defense to attempt because attempt "depends upon the mind and intent of the wrongdoer, not on the effect or result upon the person sought to be coerced"); N.Y. Penal Law § 110.10 ("If the conduct in which a person engages otherwise constitutes an attempt to commit a crime ..., it is no defense ... that the crime charged to have been attempted was ... factually or legally impossible of commission. ..."). The same is true for conspiracy; only the defendants' state of mind is relevant. *See People v. Russell*, 555 N.Y.S.2d 67, 68 (App. Div. 1990) (impossibility is not a defense to conspiracy).

Because there was ample evidence that the defendants believed Balampanis, a close associate of Dimopoulos, helped control illegal gambling in Queens-no matter whether he did or not-we conclude that the district court did not err in denying the defendants' Rule 29 motion and charging the jury that Balampanis could be a victim of the attempt and conspiracy charges.

II. *Defendants' 18 U.S.C. § 924(c) Convictions*

Next, defendants challenge their firearms convictions. Under 18 U.S.C. § 924(c)(1)(A), "any person who, during and in relation to any crime of violence ... for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm" is guilty of a federal crime. Count Thirteen charged the defendants with violating this provision, specifically naming Count One, the substantive racketeering charge, as the predicate crime of violence.

Defendants raise two challenges to their § 924(c) conviction. First, they challenge the district court's ruling that Count One qualifies as a "crime of violence." The district court held that the convictions fell within § 924(c), because Count One specifically charged violent predicate racketeering acts, even though a conviction under § 1962 is not necessarily a conviction for a crime of violence.

A crime of violence is an offense that "has as an element the use, attempted use, or threatened use of physical force against the person or property of another" or "by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." 18 U.S.C. § 924(c)(3)(A), (c)(3)(B). When determining whether an offense is a "crime of violence" under the statute, we employ a "categorical approach," in which "we focus on the intrinsic nature of the offense rather than on the circumstances of a particular crime." *United States v. Acosta*, 470 F.3d 132, 135 (2d Cir. 2006). In *Acosta*, we concluded that a conspiracy to "injure, oppress, threaten, or intimidate any person" in connection with exercising their constitutional rights under 18 U.S.C. § 241 was a crime of violence. We reasoned that "[s]ince applying physical force is perhaps the most obvious way to injure, threaten, or intimidate, a conspiracy to engage in such conduct is, by its nature, a conspiracy that involves a 'substantial risk that physical force' will be used." *Id.* at 136.

Applying this categorical approach, we first look to "the intrinsic nature" of the statute. Section 1962(c), the statutory basis for the substantive racketeering offense in Count One, provides that "[i]t shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt." A pattern of racketeering activity is defined as "at least two acts of racketeering activity...." 18 U.S.C. § 1961(5). *See United States v. Gotti*, 451 F.3d 133, 136-37 (2d Cir. 2006) (elaborating on how a "pattern of racketeering" may be proven).

Because racketeering offenses hinge on the predicate offenses comprising the pattern of racketeering activity, we look to the predicate offenses to determine whether a crime of violence is charged. Applying this reasoning, we hold that where the government proves (1) the commission of at least two acts of racketeering and (2) at least two of those acts qualify as "crime[s] of violence" under § 924(c), a § 1962 conviction serves as a predicate for a conviction under § 924(c).[4] We thus

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[4] This conclusion aligns neatly with our case law that a RICO conspiracy can constitute a "crime of violence" under statutes that provide virtually identical definitions of that term to the definition provided in § 924(c). *See, e.g., United States v. Ciccone*, 312 F.3d 535, 541-42 (2d Cir. 2002) (holding that the charged RICO conspiracy was a crime of violence under the Bail Reform Act); *United States v. Doe*, 49 F.3d 859, 866-67 (2d Cir. 1995) (finding no error in district court's ruling that a

find no error in the district court's conclusion that the charged RICO offense was a crime of violence. The underlying predicate acts, with one exception,[5] allegedly involved the use of violent means, including loansharking and violent acts of extortion; unquestionably, the conduct charged in Count One posed a "substantial risk that physical force against the person or property of another" would be used in its commission. *See* 18 U.S.C. § 924(c)(3)(A), (c)(3)(B).

The defendants' second contention is that, because the violent predicates were state law offenses, their crime of violence was not one "prosecut[able] in a court of the United States" as required by § 924(c). We conclude that whether the alleged firearms conduct was premised on state or federal predicates is irrelevant, provided that the government proves, as it did here, that the § 1962 offense alleging the pattern of racketeering is a crime of violence. The jury only considered the state law predicates to determine that the defendant used firearms as charged in Count One, which, as previously discussed, is undeniably a crime "prosecut[able] in a court of the United States" and a "crime of violence" for the purposes of § 924(c).

RICO conspiracy was a crime of violence under the Juvenile Delinquency Act).

[5] The only predicate act that was not a crime of violence was one charging gambling offenses.

III. *Whether Evidence from Rudaj's Home Should Have Been Suppressed*

We next consider whether the district court erred in admitting evidence taken from a search of Rudaj's bedroom and walk-in closet. On an appeal from a district court's ruling on a motion to suppress evidence, we review the court's factual findings for clear error, viewing the evidence in the light most favorable to the government. The district court's legal conclusions are reviewed *de novo*. *See United States v. Rodriguez*, 356 F.3d 254, 257 (2d Cir. 2004).

At approximately 6:30 in the morning on October 26, 2004, federal law enforcement agents knocked on Rudaj's door to execute an arrest warrant. The agents did not have a search warrant for Rudaj's home. Rudaj answered the door unarmed and in his boxer shorts; the government accompanied him inside, purportedly to get him dressed. Rudaj told the agents that he had a loaded hunting rifle next to his bed, which they would see when they entered his bedroom. He also said that no other individuals other than his wife and children were in the home.

After handcuffing Rudaj, the agents then secured the rest of his family members on the first floor and executed what they termed a "protective sweep," which included, as one agent testified, "the bedroom in part because we have to be in the residence in order to get him dressed." Agent Gregory Massa testified that he and his partner went upstairs to the master bedroom, and after observing the rifles propped against the bed,

cleared the bedroom to ensure the safety of themselves and the other agents and to confirm that no one else was there.

They first entered the walk-in closet in the master bedroom because it "posed the greater threat." They saw the barrel of a rifle above a pile of clothing and proceeded to clear that corner of the closet. Agent Massa testified that while doing so, they "noticed another weapon that was shorter, another rifle that was shorter in length, and several clear plastic bags which you could clearly see that contained gun cleaning equipment, things of that nature, all right in the same area." They also saw a green handgun case and two knives. The agents then cleared the second smaller closet and saw another bag, similar to those seized from the walk-in closet, and a box that contained handgun holsters, a taser, and handcuffs.

The district court denied in part and granted in part Rudaj's motion to suppress the evidence taken from his home. The court first concluded that the search of his closets could not be characterized as a protective sweep incident to his arrest. Applying *Maryland v. Buie*, 494 U.S. 325 (1990), the district court found that the sweep did not involve a search "adjoining the place of arrest" nor did the agents have articulable facts regarding the presence of others posing a danger to them to justify a more far-reaching search.

Nevertheless, the court ruled that the evidence from the search of the bedroom-the two guns on either side of the night stand and the money and keys found on the dresser-was admissible. Looking to our holding in *United States v. Di Stefano*, 555 F.2d 1094, 1101 (2d Cir. 1977), in which we held that officers have a duty to find clothing when the defendant is arrested in a state of undress, the court concluded that the agents properly secured Rudaj and, in looking for his clothing in the bedroom, could seize the contraband in his bedroom that was in plain view.

The district court further ruled that the evidence from the walk-in closet was admissible as a security sweep incident to the search for Rudaj's clothing. The district court reasoned that "[t]here is every reason to find that the balance struck in *Buie* should extend to protective searches that are conducted incident to the entry into a residence for the purpose of securing clothes for an insufficiently dressed arrestee." Therefore, because the area in the walk-in closet could potentially harbor a dangerous individual, the agents appropriately opened the closet door and observed the barrel of a handgun lying on a shelf in plain view and were therefore entitled to search the back of the closet and seize the weapon. While there, the court reasoned, they could also seize other incriminating evidence in plain view. However, the district court concluded that the evidence from the second, smaller closet was inadmissible because the objects removed from that closet-a white plastic bag and a plain cardboard box-were not "patently incriminating" because, unlike the white plastic bags properly removed from the master closet, the

"the bag in the smaller closet did not reveal any incriminating contents through the transparent plastic." Thus, the agents were not justified in removing that bag from the closet to assess its contents.

We agree that the agents were permitted to enter Rudaj's bedroom to find clothing for him and seize any incriminating evidence that was in plain view. However, Rudaj also argues that the district court wrongfully expanded the scope of the "protective sweep" doctrine by admitting the evidence seized from the closets. In *United States v. Miller,* 430 F.3d 93 (2d Cir. 2005), decided after the district court's denial of Rudaj's suppression motion, we specifically held that the "protective sweep" doctrine delineated in *Buie* applies in "circumstances other than during the in-home execution of an arrest warrant." *Miller,* 430 F.3d at 100. Similarly, we stated that protective sweeps would be justified only if the police possessed "specific, articulable facts giving rise to a reasonable inference of danger." *Id.* Rudaj argues that because the officers had no articulable reason to believe that the closets posed any danger, the district court should have suppressed all of the evidence from the closets.

We need not even resolve the question of whether *Miller* extends to the search of the closets at issue here, because we conclude that the admission of the evidence against Rudaj, if error at all, was harmless. A district court's erroneous admission of evidence is harmless "if the appellate court can conclude with fair assurance that the evidence did not substantially influence the jury." *United States v. Garcia*, 291 F.3d 127, 143 (2d Cir. 2002) (quoting *United States v. Rea*, 958 F.2d 1206, 1220 (2d Cir. 1992)). In conducting harmless error review, we consider the following factors: "(1) the overall strength of the prosecution's case; (2) the prosecutor's conduct with respect to the improperly admitted evidence; (3) the importance of the wrongly admitted [evidence]; and (4) whether such evidence was cumulative of other properly admitted evidence." *United States v. Kaplan*, 490 F.3d 110, 123 (2d Cir. 2007) (quoting *Zappulla v. New York*, 391 F.3d 462, 468 (2d Cir. 2004) (internal quotation marks omitted)); *see also United States v. Garcia*, 413 F.3d 201, 217 (2d Cir. 2005).

Although the government discussed the evidence at summation, we conclude that the admission of the evidence was harmless error. First, the government's evidence as to the issue of Rudaj's involvement in violent conduct was extensive. Several of Rudaj's recorded conversations in which he described engaging in violent extortionate conduct involving guns were heard by the jury. Additionally, multiple witnesses testified about the violent crimes that Rudaj committed in furtherance of the Organization. Thus, the evidence consisting of the rifles and

ammunition seized at the scene was cumulative of the testimonial evidence regarding Rudaj's participation in violent racketeering acts. Further, it is unlikely that Rudaj was prejudiced by the government's statements. The district court instructed the jury that it could only convict Rudaj of the § 924(c) charge if it found that he had used or carried a firearm in connection with either the extortion of Dimopoulos and Balampanis or that of the Soccer Fever victims. In light of these instructions, the seized evidence from his house had little impact on Rudaj's § 924(c) conviction. Because the government adduced ample evidence to establish Rudaj's commission of the substantive RICO offense apart from the admission of the guns, we see no reason to disturb his conviction.

IV. *Ivezaj's Role Enhancement*

Finally, Ivezaj challenges his sentence on the ground that any aggravating role enhancement the district court applied should have been based on the conduct alleged in the underlying predicate acts, rather than on his role in the RICO enterprise as a whole. We typically review a district court's factual findings in support of a role enhancement for clear error. *See United States v. Huerta*, 371 F.3d 88, 91 (2d Cir. 2004). However, because Ivezaj's challenge requires us to make a legal determination about the applicability of the enhancement, we review the district court's determination *de novo*. *See United States v. Chacko*, 169 F.3d 140, 150 (2d Cir. 1999).

U.S.S.G. § 2E1.1 addresses the base offense levels for RICO offenses, requiring a base offense level of 19 or the offense level applicable to the underlying racketeering activity. Application Note 1 to the Guideline provides that:

> Where there is more than one underlying offense, treat each underlying offense as if contained in a separate count of conviction for the purposes of subsection (a)(2). To determine whether subsection (a)(1) or (a)(2) results in the greater offense level, apply Chapter Three, Parts A, B, C, and D to both (a)(1) and (a)(2). Use whichever subsection results in the greater offense level.

U.S.S.G. § 2E1.1, cmt. n. 1. Because the Application Note treats each predicate act as "if [it were] contained in a separate count of conviction" for purposes of determining the offense level for the alleged racketeering activity, Ivezaj argues that the district court failed to consider his role in each charged act when applying the role enhancement.

We agree with the district court that a defendant's role adjustment is to be made on the basis of the defendant's role in the overall RICO enterprise. In *United States v. Damico,* the Seventh Circuit concluded that:

> [The Application Note] only requires the underlying offenses to be treated separately "for the purposes of subsection (a)(2)"-that is, only for the purpose of establishing the base offense level applicable to the RICO conspiracy. The note does not say that the separate treatment extends as

> well to application of the Chapter Three adjustments.

99 F.3d 1431, 1437 (7th Cir. 1996); *accord United States v. Yeager*, 210 F.3d 1315, 1316 (11th Cir. 2000).

We find *Damico* persuasive. First, as the government contends, analyzing a defendant's role in the overall RICO enterprise makes a good deal more sense than considering his role in each underlying predicate. In the case of a § 3B1.1(b) role enhancement, it makes little sense to allow a defendant who acts in a leadership capacity in a wide-ranging criminal enterprise to have his offense level adjusted on the basis of his participation in discrete racketeering acts. For example, a defendant who served as a leader or manager of an extensive RICO enterprise should not be able to avoid a role enhancement simply because certain predicate acts involved fewer than five participants or criminal activity that was not extensive. Second, we agree that the language of the Guidelines is clear that the requirement to look at each individual act in a RICO offense is only for the purpose of establishing the base level offense, not for applying the Chapter Three adjustments.

Therefore, we agree with the Seventh Circuit that there is "nothing in section 2E1.1 or its commentary to indicate that an adjustment like that in section 3B1.1 should not be applied to a RICO base offense level ... in the same way that it would to any other base offense level," that is, "by looking to the count of conviction ... and all relevant conduct. ..." *Damico*, 99 F.3d at 1437.

Because there was sufficient evidence to show that Ivezaj qualified for the enhancement for his role in the overall RICO enterprise, we affirm his sentence.

CONCLUSION

For the foregoing reasons, the judgments of conviction are AFFIRMED.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

[Filed June 11, 2009]

UNITED STATES OF AMERICA,

Appellee,

-v.-

PRENKA IVEZAJ, NARDINO COLOTTI, ALEX RUDAJ, ANGELO DIPIETRO, NIKOLA DEDAJ, AND LJUSA NUCULOVIC,*

Defendants-Appellants.

Docket Nos. 06-3112-cr (L), 06-3275-cr (CON), 06-3296-cr (CON), 06-3339-cr (CON), 06-3372-cr (CON), 06-5908-cr (CON)

* The Clerk of Court is directed to amend the official caption as indicated.

FOR DEFENDANT-APPELLANT IVEZAJ:

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(Steven Y. Yurowitz, *on the brief*),
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FOR DEFENDANT-APPELLANT COLOTTI:

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New York, N.Y.

FOR DEFENDANT-APPELLANT RUDAJ:

HAROLD PRICE FAHRINGER
(Erica T. Dubno, *on the brief*),
New York, N.Y.

FOR DEFENDANT APPELLANT DIPIETRO:

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FOR DEFENDANT-APPELLANT DEDAJ:

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FOR DEFENDANT-APPELLANT NUCULOVIC:

JOHN BURKE,
Brooklyn, N.Y.

FOR APPELLEE:

JENNIFER G. RODGERS,
Assistant U.S. Attorney (Timothy J. Treanor, Benjamin Gruenstein & Jonathan S. Kolodner, Asst. United States Attorneys, *on the brief*), *for* Michael J. Garcia, United States Attorney for the Southern District of New York, New York, N.Y.

PRESENT:

HON. WILFRED FEINBERG,
HON. ROGER J. MINER,
HON. BARRINGTON D. PARKER,
Circuit Judges.

SUMMARY ORDER

Rulings by summary order do not have precedential effect. Citation to summary orders filed after January 1, 2007, is permitted and is governed by this Court's Local Rule 32.1 and Federal Rule of Appellate Procedure 32.1. In a brief or other paper in which a litigant cites a summary order, in each paragraph in which a citation appears, at least one citation must either be to the Federal Appendix or be accompanied by the notation: (summary order). A party citing a summary order must serve a copy of that summary order together with the paper in which the summary order is cited on any party not represented by counsel unless the summary order is available in an electronic database which is publicly accessible without payment of fee (such as the database available at http://www.ca2.uscourts.gov/). If no copy is served by reason of the availability of the order on such a database, the citation must include reference to that database and the docket number of the case in which the order was entered.

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 11th day of June, two thousand and nine,

UPON DUE CONSIDERATION, it is hereby ORDERED, ADJUDGED, AND DECREED that the judgments of conviction are AFFIRMED.

Defendants-Appellants Prenka Ivezaj, Nardino Colotti, Alex Rudaj, Angelo DiPietro, Nikola Dedaj, and Ljusa Nuculovic (the "defendants") appeal their judgments of conviction entered by the United States District Court for the Southern District of New York (Cote, J.) on racketeering and other charges. We assume the parties' familiarity with the underlying facts, procedural history, and issues presented on appeal, as well as the opinion in this case filed separately today.

Defendants challenge the district court's refusal to discharge Juror Four. Several defense counsel moved to dismiss the juror, complaining that the juror engaged in outbursts and other behavior suggesting antagonism towards the defendants. Rather than dismiss the juror, the district court gave general instructions to the jury reminding them to keep open minds and refrain from discussing the case or sharing opinions aloud before the termination of trial. "The determination of whether a juror can serve impartially will not be disturbed absent a clear abuse of discretion." United States v. Perez, 387 F.3d 201, 205 (2d Cir. 2004). Because we give trial judges broad flexibility in handling such matters, we find no abuse of discretion here.

Defendant Colotti contends that the district court erred in excusing Juror 90. Both the judge and the courtroom deputy spoke with the juror on different occasions regarding personal matters that were interfering with her ability to serve. Eventually, the juror was dismissed. We find no abuse of discretion in the manner in which the district court handled the dismissal.

Several defendants also claim that the district court erred in admitting non-testifying codefendant Nuculovic's inculpatory statements to federal agents. Before he was arrested, Nuculovic admitted that he had been involved in a criminal organization run by Colotti, Rudaj, and Dedaj. When the government informed the district court of its intention to offer his statements, the defendants moved for severance on the grounds that the admission of the testimony would violate the Sixth Amendment's Confrontation Clause. The court instead ordered a number of redactions. The orders precluded any government witness from testifying about Nuculovic's use of the phrase "three leaders" to describe the leadership of the Rudaj Organization as such testimony would implicate Colotti, Rudaj, and Dedaj. After one of the agents testified that Nuculovic had stated that he and "three leaders" of the organization took over illegal gambling, the court recessed and reminded the parties that it had prohibited the government from referring to the "three leaders." At that point, counsel for Rudaj, Colotti, and Dedaj moved for a mistrial, which the district court denied. In response to defense counsel's desire not to call additional attention to the agent's mistake, the

district court struck the statements from the record outside the presence of the jury.

We review a district court's evidentiary decisions for abuse of discretion, see United States v. Thompson, 528 F.3d 110, 120 (2d Cir. 2008), and find none here. The district court specifically instructed the jury prior to the agent's testimony that Nuculovic's inculpatory statements were being admitted solely against Nuculovic and that the jury was not to consider the statements against any other defendant. "Absent evidence to the contrary, we must presume that juries understand and abide by a district court's limiting instructions." United States v. Downing, 297 F.3d 52, 59 (2d Cir. 2002). Additionally, the district court found that the statements were sufficiently redacted so that no other defendant could be implicated by Nuculovic's admission. We believe that any prejudice stemming from the testimony was minimal and was adequately addressed by the district court's prophylactic measures. Accordingly, the defendants' challenges fail.

Rudaj and Colotti next challenge the district court's failure to dismiss one of the racketeering acts. Because the jury ultimately found that charge unproven, the defendants claim that we should conclude retroactively that the racketeering act was improperly joined because it had a prejudicial spill-over effect. "The term 'retroactive misjoinder' refers to circumstances in which the 'joinder of multiple counts was proper initially, but later developments-such as a district court's dismissal of some counts for lack of evidence or an appellate court's reversal of less than all convictions-render

the initial joinder improper.'" United States v. Hamilton, 334 F.3d 170, 181 (2d Cir. 2003) (quoting United States v. Jones, 16 F.3d 487, 493 (2d Cir. 1994)). "The concept of prejudicial spillover ... requires an assessment of the likelihood that the jury, in considering one particular count or defendant, was affected by evidence that was relevant only to a different count or defendant." Hamilton, 334 F.3d at 182. Here we discern no prejudicial effect, given the overall strength of the government's case. See id.

Several defendants also maintain that the court did not give them sufficient time to confer with their counsel regarding peremptory challenges. Trial courts have ample discretion to determine the procedures under which peremptory challenges are exercised, see United States v. Thompson, 76 F.3d 442, 451 (2d Cir. 1996), and the district court repeatedly warned defense counsel that they would have a brief period at the end of jury selection in which to consult regarding their strikes. While other procedures were available to the district judge, and the approach she took was, conservatively stated, aggressive, defendants have not demonstrated that the court abused its discretion.

Nuculovic argues that his trial counsel was constitutionally ineffective because his counsel allegedly fell asleep at various points during the trial and failed to consult with Nuculovic and call witnesses on his behalf. Nuculovic's claim is best addressed on habeas review under 28 U.S.C. § 2255, rather than on direct review, so "that the allegedly ineffective attorney ... [is] given the

opportunity to explain the conduct at issue." United States v. Khedr, 343 F.3d 96, 100 (2d Cir. 2003). Consequently, we decline to address this claim now. See Massaro v. United States, 538 U.S. 500, 504 (2003).

Finally, several of the defendants raise challenges to the sufficiency of the evidence adduced to support their convictions. "[A] defendant raising an appellate challenge to the sufficiency of the evidence supporting a conviction faces a heavy burden, because we must review the evidence in the light most favorable to the government, drawing all reasonable inferences in its favor." United States v. Gaskin, 364 F.3d 438, 459 (2d Cir. 2004) (internal quotation marks omitted). We have repeatedly established that "[r]eversal is warranted only if no rational factfinder could have found the crimes charged proved beyond a reasonable doubt." Id. at 459-60. After reviewing the substantial evidence of guilt the government adduced at trial, we conclude that the defendants have not met this heavy burden.

We have considered the defendants' remaining contentions and find them to be without merit. Accordingly, we affirm the judgment of the district court.

For the Court:
Catherine O'Hagan Wolfe, Clerk

By: _____

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

X

UNITED STATES OF AMERICA,

-against-

ALEX RUDAJ, et al.,

Defendants.

04 Cr.1110 (DLC)

OPINION AND ORDER

X

APPEARANCES:

For the Government:

TIMOTHY TEANOR, Esq.
JENNIFER G. RODGERS, Esq.
BENJAMIN GRUENSTEIN, Esq.
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For the Defendant Alex Rudaj:

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DENISE COTE, District Judge:

Defendant Alex Rudaj ("Rudaj") has moved to suppress evidence seized without a warrant from his home on the morning of his arrest. A hearing was held on September 7, 2005. For the following reasons, the motion is granted in part.

BACKGROUND

At the hearing, the Government called two agents from the Federal Bureau of Investigation (FBI) to testify. The defendant did not testify. The following constitutes this Court's findings of fact.

On October 26, 2004, a team of agents from the FBI arrived at the large, single-family house where Rudaj and his family lived to serve an arrest warrant. This arrest was one of many that morning of the defendants indicted in this case. In a briefing prior to the arrest, the agents were told that several of the targeted individuals had not yet been accounted for, but the agents were given no reason to believe that anyone other than Rudaj and his family were at the Rudaj residence that morning. The lead agent on the Rudaj arrest team had also been told by another agent that Rudaj kept weapons in his home.

The agents arrived around 6:30 a.m. The agents first called the residence in an attempt to notify Rudaj and his family that they were outside, and then knocked on the front door of the house. A few minutes after the agents knocked, Rudaj opened the door and was handcuffed.

Because Rudaj answered the door in his underwear, the arresting agents escorted him back inside his house to get clothing for him to wear. The agents asked Rudaj if there were any weapons in the house and who else was in the house. Rudaj answered that there was a loaded hunting rifle by the bed, and that the only others in the house were his wife and children. The agents gathered the Rudaj family in a downstairs room and conducted a security sweep of at least the garage, basement, and the master bedroom. The lead agent testified that the purpose of the security sweep was to get Rudaj dressed and to remove him safely from the residence.

Two agents proceeded upstairs to perform a protective sweep of the master bedroom. The agents who had arrested Rudaj expected to find the clothing needed to dress Rudaj in that room. Upon entering the bedroom, the agents noticed two long guns on either side of a nightstand next to the bed. On top of a dresser were several bundles of U.S. currency and a collection of keys, among other items.

The agents then opened the door to a walk-in closet and noticed toward the rear of the closet the barrel of another rifle sticking up above clothing hung from the top rack. The gun was standing upright on a lower shelf and the most hotly contested factual dispute from the hearing is whether the top of the barrel was visible from the entrance of the closet. Having carefully studied the photographs of the interior of the closet and having observed the agents as they described the scene, I find that approximately five or six inches of the barrel of the gun was visible. The barrel extends thirteen inches past the gun's stock. A little less than half of that section would have been visible. This was sufficient to allow agents familiar with the appearance of firearms and already aware of the existence of rifles in the bedroom to recognize the barrel as part of a rifle. When they pushed the clothing back to secure the weapon, the agents discovered a number of items including a second rifle, a handgun case, two knives, and transparent plastic bags containing ammunition and gun-cleaning supplies. The agents also lifted down a shoe box that was on a high shelf in the closet and opened it.

The agents continued the security sweep of the bedroom by looking into a second, smaller closet across the room. Although the closet contained mostly women's clothing, in the bottom corner, the agents noticed camouflage clothing, men's work boots, and a white plastic bag sitting on top of a cardboard box. Noting that the bag resembled the plastic bags found in the walk-in closet that had been used to store gun-related paraphernalia, the agents pulled the bag out of the closet by pulling out the box on which it rested. Their purpose was to inspect the bag more closely. The bag apparently did not contain anything of note, but when the officers inspected the box, they found a number of gun holsters, a taser, and handcuffs. For reasons which will become clear, it is unnecessary to decide whether the agents opened the box or whether they were simply able to see its contents once they removed the bag from on top of the box.

Having verified that nobody else was in the room, the two agents upstairs called down to the agent leading the arrest team to see what they had found. The team leader then called the Assistant United States Attorney, who instructed the agents to seize incriminating items that were in plain view. The agents proceeded to photograph what they intended to seize, and then prepared a detailed inventory and seized what they believed to be the incriminating items from the room. The agents recognized the keys as fitting in the types of padlocks that are often used on video gambling machines. Knowing that Rudaj was suspected of managing a number of gambling operations and was involved in picking up the money from those

operations, the agents believed the keys to be incriminating evidence of the gambling activities.

In moving to suppress the items seized from his home, Rudaj asserted in an affidavit that the money was under folded shirts in his dresser and was not in plain view. Rudaj presented no evidence to support that contention at the hearing, and I find that the money was in plain view on top of the dresser. His affidavit also asserted that the two rifles in the master closet were "behind clothing." As already explained, I find that one was visible from the entrance to the closet and the other was in plain view when the officers entered the closet to seize the first rifle.

Although Rudaj's counsel had initially conceded that the agents were entitled to enter the master bedroom to retrieve clothing for him to wear, at the hearing he altered course and argued that the agents should have allowed Rudaj's wife to bring clothing from the master bedroom without being accompanied by the agents and that in any event all of the items the agents saw in the bedroom had to be suppressed because the agents entered the bedroom as part of an impermissibly broad protective sweep through the entire house.

DISCUSSION

By its terms, the Fourth Amendment prohibits only "unreasonable" searches and seizures. U.S. Const. amend. IV. But "[w]ith few exceptions, the question whether a warrantless search of a home is reasonable and hence constitutional must be answered no." *Kyllo v. United States*, 533 U.S. 27, 31 (2001). Thus, when the government searches a citizen's home without a warrant, "the burden of showing that the search fell within one of the exceptions to the warrant requirement is on the government." *United States v. Kiyuyung*, 171 F.3d 78, 83 (2d Cir.1999). "As in other Fourth Amendment contexts ... the 'reasonableness' inquiry ... is an objective one: the question is whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation." *Graham v. Connor*, 490 U.S. 386, 397 (1989).

I. *Protective Sweep Incident to Arrest*

The Government first characterizes the search of Rudaj's bedroom as a protective sweep incident to his arrest. For the reasons that follow, the search cannot be so justified.

The Fourth Amendment standard for protective sweeps conducted in the course of an arrest was laid out by the Supreme Court in *Maryland v. Buie*, 494 U.S. 325 (1990). The Court held that "as an incident to the arrest," officers may "look in closets and other spaces immediately adjoining the place of arrest from which an attack could immediately be

launched." *Id.* at 334. This limited sweep may be conducted "as a precautionary matter and without probable cause or reasonable suspicion." *Id.*

If the officers wish to undertake a more wide-ranging sweep, however, "there must be articulable facts which, taken together with the rational inferences from those facts, would warrant a reasonably prudent officer in believing that the area to be swept harbors an individual posing a danger to those on the arrest scene." *Id.* "[G]eneralizations, without more, are insufficient to justify a protective sweep." *United States v. Moran Vargas*, 376 F.3d 112, 116 (2d Cir. 2004). So too is a lack of information. *Id.* at 117. Moreover, "[t]he justification for a protective sweep is ephemeral: it may last no longer than is necessary to dispel the reasonable suspicion of danger and in any event no longer than it takes to complete the arrest and depart the premises." *Moran Vargas*, 376 F.3d at 115 (citation omitted).

Yet even "if justified by the circumstances," a protective sweep is "aimed at protecting the arresting officers," *Buie*, 494 U.S. at 335, not gathering evidence. It is therefore "not a full search of the premises, [and] may extend only to a cursory inspection of those spaces where a person may be found." *Id.* Nevertheless, "[p]atently incriminating evidence that is in plain view during a proper security check may be seized without a warrant." *Kiyuyung*, 171 F.3d at 83.

The seizure of evidence from the upstairs bedroom is proper as part of a protective sweep incident to arrest only if the search of the bedroom falls into one of the categories described in *Buie*. The first is clearly not applicable: the upstairs bedroom is by no means "immediately adjoining the place of arrest" when the arrest occurred on the doorstep of the home and the sweep encompassed a second floor bedroom. *See United States v. Lauter*, 57 F.3d 212, 216-17 (2d Cir. 1995) (noting the relevance of "the small size of the apartment" in approving the search of a bedroom in a two-room apartment).

But the bedroom could be included in a protective sweep if the agents had "articulable facts that support an inference that the area to be swept harbors an individual posing danger to those present." *Id.* at 216. The Second Circuit has consistently demanded that this standard be met for protective sweeps beyond the area immediately adjoining the place of arrest. *See United States v. Blue*, 78 F.3d 56, 60 (1996) (concluding that a search cannot be justified as a protective sweep where the officers have "failed to articulate specific reasons for their suspicion that the [area searched] harbored a dangerous person"); *United States v. Mickens*, 926 F.2d 1323, 1328 (2d Cir. 1991) (upholding a search where "arresting officers had reason to believe that [other individuals]-both of whom resided in the house-were on the premises").

No such articulable facts were offered by the Government. The agents asked Rudaj if anybody aside from his wife and children (who were all accounted for downstairs at the time of the sweep of the master bedroom) were in the house, and Rudaj replied in the negative. The agents made no observations that morning that would lead them to believe that somebody else was at the Rudaj residence, nor had they received any prior information to that effect. On the contrary, the lead agent for the arrest team stated that the sweep of Mr. Rudaj's bedroom was intended "to ascertain whether or not there was anyone in the residence that could be a threat" and that "there was a possibility there could be additional people" present. But lack of information and unfounded speculation do not rise to the level of a specific, articulable basis for a reasonable belief. *See Moran Vargas*, 376 F.3d at 117. The Government has therefore not carried its burden, and the search of the upstairs bedroom (and closets therein) cannot be justified as part of a protective sweep incident to the arrest of Rudaj downstairs.

II. Search of the Bedroom

The conclusion that the search was not proper either as incident to arrest or because of a reasonable belief that the bedroom harbored an individual posing a danger does not, however, end the Fourth Amendment inquiry. In its brief, the Government also argues that "because Rudaj was not dressed at the time of his arrest, the agents were required to reenter the house so as to allow him to get dressed." The choice of verbs is apt: "courts routinely distinguish between the arrest itself and subsequent procurement of clothing for the arrestee, requiring independent justification for entry or reentry into a room or dwelling after the arrest itself has been completed." *United States v. Clay*, 408 F.3d 214, 218 (5th Cir.2005) (*citing, inter alia, United States v. Di Stefano*, 555 F.2d 1094, 1101 (2d Cir. 1977)). If the agents' presence and seizure of evidence upstairs is to be justified, then, it must be as part of a separate legal entry into that portion of the Rudaj residence.

The Second Circuit has long recognized that an arresting officer has a duty to ensure that an arrestee is sufficiently dressed before removing her from her residence. *Di Stefano*, 555 F.2d at 1101. In the fulfillment of that duty, the officer may accompany the arrestee into the residence (or another part thereof) "to maintain a 'watchful eye' on her and to assure that she did not destroy evidence or procure a weapon." *Id.*; *see also Washington v. Chrisman*, 455 U.S. 1, 6 (1982) ("'The officer had a right to remain literally at [the arrestee's] elbow at all times ....").

Alternatively, the officers may choose to keep the arrestee in a secure location and send one of their own to get the clothing. *See Di Stefano*, 555 F.2d at 1101; *United States v. Titus*, 445 F.2d 577, 578-79 (2d Cir. 1971); *see also United States v. Gwinn*, 219 F.3d 326, 333 (4th Cir. 2000) ("[T]he arrestee's partially clothed status may constitute an exigency justifying the officer's temporary reentry into the arrestee's home to retrieve clothes reasonably calculated to lessen the risk of injury to the defendant."). Either way, a warrantless entry is justified and an officer's presence in the arrestee's residence is lawful.

As with warrantless searches, warrantless seizures are also "*per se* unreasonable under the Fourth Amendment-subject only to a few specifically established and well-delineated exceptions." *Katz v. United States*, 389 U.S. 347, 357 (1967). One of those exceptions is the "plain-view" doctrine. That doctrine "permits a law enforcement officer to seize what clearly is incriminating evidence or contraband when it is discovered in a place where the officer has a right to be." *Chrisman*, 455 U.S. at 5-6. If the officer does not recognize the incriminating nature of the evidence "without conducting some further search of the object-i.e., if its incriminating character [is not] immediately apparent-the plain-view doctrine cannot justify its seizure." *Minnesota v. Dickerson*, 508 U.S. 366, 375 (1993) (citation omitted). In other words, the evidence must be "[p]atently incriminating." *Kiyuyung*, 171 F.3d at 83.

Applying these principles to the present case, it is clear that all evidence seized from the bedroom that was in plain view when the agents entered the bedroom is admissible. Rudaj had opened the front door, and was subsequently arrested, wearing only his underwear and a t-shirt. The arresting agents had a duty to provide clothing for him and a right to be in the bedroom to fulfill that duty.

Rudaj argues that the agents should not have been allowed to enter his house at all and suggests that the agents should have stayed outside while his wife went to get him clothing. That the agents might also have gotten the clothes this way is irrelevant. *See United States v. Mason*, 523 F.2d 1122, 1126 (D.C. Cir. 1975) ("The agents undoubtedly could have taken measures which would have rendered a search of the closet unnecessary ..., but the existence of alternative approaches does not imply that what actually occurred was unreasonable."). The agents were under a duty to provide Rudaj with clothing, but they were under no duty to let him or his family go upstairs unaccompanied to get the clothing. Moreover, they would have been constitutionally permitted to, and indeed foolish not to, accompany whoever went upstairs to ensure that she did not destroy evidence while there or return downstairs with a weapon. *See Washington v. Chrisman*, 455 U.S. at 6 (1982); *Di Stefano*, 555 F.2d at 1101. The evidence seized from the room would have fallen in the plain view of the accompanying officers, and its seizure would still have been appropriate.

Rudaj further argues that the agents always intended to do a security sweep of the entire house and would have done so even if Rudaj had been arrested fully clothed. The Fourth Amendment requires an agent's actions to be reasonable in the circumstances, and does not inquire into subjective intent. *See United States v. Dhinsa*, 171 F.3d 721, 725 (2d Cir. 1998). The agents were permitted by the circumstances presented here to enter the bedroom to procure clothing for Rudaj. Whether they intended to enter the room in any event is irrelevant since it was entirely lawful for them to be in the room. *See Whren v. United States*, 517 U.S. 806 (1996) ("[T]he Fourth Amendment's concern with 'reasonableness' allows certain actions to be taken in certain circumstances, *whatever* the subjective intent.").

It is undisputed that the seizure from the bedroom of the two guns and the money on the dresser was lawful under the plain-view doctrine if the agents were entitled to be in the bedroom. Rudaj disputes, however, whether the keys lying on the dresser next to the stacks of money could be lawfully seized under that doctrine.

Rudaj did not give notice that he was challenging the seizure of the keys on the theory that their evidentiary value was not readily apparent. Through his cross-examination of the Government's witness, however, Rudaj's counsel challenged the seizure. Even though the Government was not prepared to present evidence on this issue at the hearing, the agents' testimony is sufficient to support the seizure.

The seizure of the keys was proper under the plain-view exception to the warrant requirement because the incriminating character of the keys was immediately apparent to the agents. The seizing agent had been informed prior to the arrest that Rudaj was believed to be involved in illegal gambling, and more specifically, to have participated in the weekly collections of money from gambling machines. The agent further recognized the keys on the dresser as matching the type of lock commonly used to secure gambling machines. In light of this information, the discovery of the keys in the immediate vicinity of large amounts of cash could fairly give rise to "probable cause to suspect that the [keys were] connected with criminal activity." *Illinois v. Andreas*, 463 U.S. 765, 771 (1983). "Put another way, it [would] have been 'immediately apparent' to the officer before seizing the [keys] ... that [they were] of a criminal character," and therefore subject to seizure under the plain-view doctrine. *United States v. Barrios-Moriera*, 872 F.2d 12, 16 (2d Cir. 1989). Because the guns, money, and keys were clearly in plain view of the agents who entered the bedroom, and their incriminating nature was immediately apparent, the seizure of these items was proper. *Di Stefano*, 555 F.2d at 1101; *Titus*, 445 F.2d at 579 ("Everything the agents took was in their 'plain view' while they were where they had a right to be ....").

III. *Protective Sweep of the Closets*

The seizure of evidence from the two closets is more problematic. The Government does not argue, and the evidence does not suggest, that the barrel of the gun protruding above the upper rack of clothing in the master closet was in plain view from the bedroom itself. Nor, significantly, does the Government argue that the discovery of the gun, which was in plain view upon entry into the closet, would have been inevitable in the course of procuring Rudaj's clothing, most of which, presumably, was kept in this closet. *See United States v. Ford*, 22 F.3d 374, 376-77 (1st Cir. 1994) (applying the inevitable discovery rule to evidence seized during a protective sweep and not reaching the lawfulness of the sweep). Instead, the Government maintains that the search of the closets was proper as part of a protective sweep. Yet as explained above, the search of the closets exceeded the scope of a permissible sweep incident to an arrest. Moreover, the agents' presence in the bedroom must be considered a separate legal entry into the Rudaj residence. If the search of the bedroom closets is proper, then, it must be as part of a security sweep incident to this second entry.

The *Buie* Court did not address the question of whether the standard it articulated would apply to protective sweeps conducted in circumstances other than the execution of an arrest. To be sure, the standard is framed in terms of an arrest, but that may simply reflect the facts of that particular case. The Court did not explicitly limit its holding to such sweeps. "*Buie* gives no indication that circumstances other than arrest which expose

police officers to a comparable danger could not also justify a similar protective response (at least where those circumstances are not the product of police illegality or misconduct)." *United States v. Gould*, 364 F.3d 578, 581 (5th Cir. 2004) (en banc); *see also United States v. Knights*, 534 U.S. 112, 117 (2001) (criticizing as "dubious logic" the argument "that an opinion upholding the constitutionality of a particular search implicitly holds unconstitutional any search that is not like it").

The Second Circuit has twice been confronted with this issue recently, but declined to reach it both times. *See United States v. Gandia*, ____ F.3d ____, 2005 WL 227103 at *8; *Moran Vargas*, 376 F.3d at 115. It has, however, provided some guidance on how *Buie* should be interpreted. In one of its first cases applying *Buie*, the Court of Appeals explained that "*Buie* cannot be read in isolation, for its holding draws heavily from *Terry v. Ohio* and *Michigan v. Long*. ... [I]n all three cases, the Court applied the same balancing test to different factual situations." *Hernandez*, 941 F.2d at 136. This Court must therefore turn to the balancing test invoked in these cases to guide its decision on the applicability of *Buie's* framework to the sweep of the closets incident to the second entry.

According to the Supreme Court, "there is 'no ready test for determining reasonableness other than by balancing the need to search ... against the invasion which the search ... entails.'" *Buie*, 494 U.S. at 332 (quoting *Terry v. Ohio*, 392 U.S. 1, 21 (1968)) (omissions in original). The interests at stake here are essentially identical to those recognized in *Buie*. The officers have the same

interest "in taking steps to assure themselves that the house ... is not harboring other persons who are dangerous and who could unexpectedly launch an attack," regardless of whether an arrest has taken place.[1] *Id.* at 333. They face the same "disadvantage of being on [their] adversary's 'turf' " and the same danger of "[a]n ambush in a confined setting of unknown configuration." *Id.* The invasion occasioned by the protective search is also the same, assuming that it is similarly restricted in scope to the search described in *Buie*.

There is every reason to find that the balance struck in *Buie* should extend to protective searches that are conducted incident to the entry into a residence for the purpose of securing clothes for an insufficiently dressed arrestee. Indeed, it arguably "would make no sense to hold that the police may conduct a protective sweep when lawfully entering with a warrant but must refrain from doing so when lawfully entering" on another basis. *United States v. Martins*, 413 F.3d 139, 149-50 (1st Cir. 2005). A similar conclusion has been reached by several Courts of Appeals that have addressed the issue. *See Id.* ("[P]olice who have lawfully entered a residence possess the same right to conduct a protective sweep whether an arrest warrant, a search warrant, or the existence of exigent circumstances prompts their entry."); *Gould*, 364 F.3d at 584 (holding that "arrest is not always, or

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[1] Although the search for clothes is considered a separate entry into the arrestee's residence and must therefore be independently justified, in this case an arrest had just taken place.

per se, an indispensable element of an in-home protective sweep"); *United States v. Taylor*, 248 F.3d 506, 513 (6th Cir. 2001) (holding that, because officers could lawfully secure an area entered by consent while awaiting a search warrant, "it follows logically that ... the police may conduct a limited protective sweep to ensure the safety of those officers"); *United States v. Garcia*, 997 F.2d 1273, 1282 (9th Cir. 1993) (upholding protective search following consented entry); *United States v. Patrick*, 959 F.2d 991, 996-97 (D.C. Cir. 1992) (same); *see also United States v. Murphy*, 16 F. Supp. 2d 397, 400 (S.D.N.Y. 1998) ("The finding that [the arrestee] answered the door in a state of undress and sought to return to the apartment for his clothes fully justified the officers in accompanying him into the premises and in conducting a protective sweep."). *But see United States v. Medina*, 301 F. Supp. 2d 322, 333 (S.D.N.Y. 2004) (explaining that protective sweep had not been unduly delayed because officers "could not do a protecting sweep until after the arrest"); *United States v. Santos*, 303 F. Supp. 2d 333, 348 (S.D.N.Y. 2003) (noting that "the protective sweep doctrine is limited in two ways-the sweep must be incident to a lawful arrest and confined to areas where a person could hide or that are within a suspect's 'grab area'").

When the entry into a section of a home is lawful, it is entirely reasonable for officers to confirm through a limited protective inspection of the immediate vicinity that they are not at physical risk. Prudence, common sense, and the realities of law enforcement work support such a conclusion. A limited protective sweep comports with Fourth Amendment principles that the standard is workable for "rank and file, trained police officers," *Andreas*, 463 U.S. at 772, that a resident's legitimate expectation of privacy in immediately adjoining areas is significantly diminished once officers can lawfully enter into a room, and that the standard be an objective one that is "not dependent on the belief of individual police officers." *Id.* at 773.

Finally, because the interests at stake are the same, the contours of the balance struck between them must also be the same here as in *Buie*. Arresting officers are not granted any more leeway to invade the privacy unnecessarily of an insufficiently dressed arrestee than they have with the fully dressed. To paraphrase Judge Learned Hand, it would be "small consolation to know that one's papers are safe only so long as one is [fully dressed] at home." *United States v. Kirschenblatt*, 16 F.2d 202, 203 (2d Cir. 1926). The limits on protective sweeps outlined in *Buie* must therefore apply to an entry for the purpose of securing clothing. Specifically, the sweep must be limited to "a cursory inspection of those spaces where a person may be found" and must be supported by specific, articulable facts if it is to exceed the area "from which an attack could be immediately launched." *Buie*, 494 U.S. at 335, 334.

Extending the *Buie* framework to the agents' entry into the Rudaj bedroom, the agents sent upstairs "could, as a precautionary matter and without probable cause or reasonable suspicion, look in closets and other spaces immediately adjoining" the area in which they were lawfully permitted to enter in the fulfillment of a duty to obtain clothing for an arrestee.[2] *Id.* at 334. Once

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[2] The availability of this type of search to the arresting officers is not precluded by the Second Circuit's opinions in *United States v. Gandia*, ___ F.3d ___, 2005 WL 2277103 (2d Cir. Sept. 19, 2005), and *Moran Vargas*, 376 F.3d 112. In both cases, the Court of Appeals held unconstitutional protective sweeps of rooms immediately adjoining the location of non-custodial questioning for lack of specific, articulable facts to justify each search. Also common to the cases was the fact that the initial entry by the police was made pursuant to the consent of the inhabitant.

In *Gandia*, the Court of Appeals made clear that it was applying this heightened standard, limited in *Buie* to more far-reaching protective sweeps, out of "concern" that a more straightforward application of *Buie* would "encourage officers to obtain ... consent as a pretext for conducting a warrantless search of the home." *Id.* at 262. The Second Circuit was not confronted in either case with the situation facing the agents here, where law enforcement officials executing an arrest were under a legal duty that required warrantless entry to a restricted portion of a private residence. *See Di Stefano*, 555 F.2d at 1101 (noting that agents could fulfill duty alone or by accompanying arrestee to get clothing). Indeed, the court in *Gandia* stressed that "there was no need for the police officers to enter Gandia's home in the first place." *Id.* The questioning in both cases could just as easily have been carried out in a common area of the building.

Nor does *Kiyuyung*, 171 F.3d 78, compel a contrary conclusion. In that case, the Court of Appeals suppressed a gun found in a closet because the Government did not sustain its burden of establishing that the closet doors were open, and

they opened the closet door as part of this precautionary search, the barrel of a gun protruding above the upper shelf fell into their plain view. Having identified the barrel as part of a weapon, the agents were entitled to approach the back of the closet and seize the weapon. While there, the agents could also seize the other patently incriminating evidence that fell into their plain view, including the other gun, the gun case, the knives, ammunition, and gun-cleaning supplies. All of the evidence seized from the master closet is therefore admissible.[3]

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the gun consequently in plain view, when the officers performed their security sweep of an arrestee's apartment. *See id.* The court's opinion reflects the Government's argument that the closet was already open, and did not address the question of whether the arresting officers could have opened the closet as part of their search. The court did, though, state that the officers were "entitled to make a quick and limited 'security check' of the premises to be sure that there are no persons or objects on the premises to pose a safety threat to the officers." *Id.* at 83. The ability to execute this type of check implies the ability to open a closet where a dangerous person might be hiding.

[3] While seizing evidence in the corner of the closet, the agents also lifted a closed shoe box from the top shelf of the closet and opened it. The Government announced at the suppression hearing that it would not introduce evidence discovered in the shoe box. Nor could it. In their search of the box, the agents disregarded the Supreme Court's admonition in *Buie* that a protective sweep is "not a full search of the premises, but may extend only to a cursory inspection of those spaces where a person may be found." 494 U.S. at 335. The excessive scope of the sweep lends some support to Rudaj's assertion that the agents intended from the beginning to conduct a thorough search of the premises. Nevertheless, a security sweep of the closets was objectively reasonable under the circumstances,

A different conclusion must be reached with respect to the evidence seized from the second, smaller closet. Entry into this closet for the purpose of a limited security check was proper, and the agents could likewise have seized any "[p]atently incriminating" evidence discovered in their plain view while looking for dangerous persons. *Kiyuyung*, 171 F.3d at 83. The white plastic bag and plain cardboard box that the agents removed from this closet were not, however, patently incriminating. In contrast to the white plastic bags properly removed from the master closet, the bag in the smaller closet did not reveal any incriminating contents through the transparent plastic.

The Government argues that the bag and box were sufficiently incriminating to justify seizure under the plain-view exception because they were found next to camouflage clothes in his wife's closet and because the bag resembled other white plastic bags found in the master closet. These two facts do not suffice to make the incriminating character of the bag or its contents "immediately apparent" without a further search. *Minnesota v. Dickerson*, 508 U.S. at 375.

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and evidence discovered in plain view during the properly executed portions of this sweep is admissible.

The Government further argues that the Fourth Amendment permits the warrantless search of containers believed to contain incriminating evidence. This is not the law. "[T]he Fourth Amendment provides protection to the owner of every container that conceals its contents from plain view," *United States v. Ross*, 456 U.S. 798, 822-23 (1982), unless specific and limited conditions obtain that would diminish that protection. *See, e.g., California v. Acevedo*, 500 U.S. 565, 574 (1991) (container in automobile); *Andreas*, 463 U.S. at 773 (1983) (container previously searched by government); *United States v. Place*, 462 U.S. 696, 701 (1983) (exigent circumstances justifying seizure); *Arkansas v. Sanders*, 442 U.S. 753, 764 n. 13 (1979) (distinctive, single-purpose container). In the absence of such conditions, however, the propriety of a warrantless search under the plain-view doctrine depends solely on the visibility of the contents, not of the container itself. For it is in the contents that the expectation of privacy lies. *See United States v. Chadwick*, 433 U.S. 1, 13 n. 8 (1977).

Thus, the plain-view exception to the warrant requirement justifies the search of a closed container only if it "sp[eaks] volumes as to its contents," *Barrios-Moriera*, 872 F.2d at 17 (citation omitted), which is to say, only if the contents themselves are essentially in plain view. Both of the cases relied upon by the Government reflect this limitation. See *United States v. Grubczak*, 793 F.2d 458, 461 (2d Cir. 1986) (noting that the agent "had *concluded* that the case [searched] contained lock-picking tools *before* he picked it up"); *United States v. Ocampo*, 650 F.2d 421, 427 (2d Cir. 1981)

(noting that the container was "unsealed," allowing the agent to see "currency sticking out of it"). Here, however, the plastic bag in the small closet revealed nothing about its contents to the agents. *Cf. United States v. Martin*, 157 F.3d 46, 55 (2d Cir. 1998) (expressing skepticism that the plain-view doctrine would apply where police knew of a package's incriminating contents from a third party but had not seen the contents themselves).

Without a warrant, the agents were not justified in removing the bag for a closer inspection. The same is necessarily true with respect to the box, whose contents were revealed only after it was removed from the closet and the plastic bag was lifted off of it. *See Dickerson*, 508 U.S. at 379 (explaining that seizure "could not be justified by the plain-view doctrine" where probable cause as to the item's incriminating nature arises "only as a result of a further search-the moving of the [item seized]-that was not authorized by a search warrant or by any exception to the warrant requirement").

Because the plastic bag was not subject to seizure under the plain-view doctrine, the agents were not entitled to remove it from the closet to inspect it more closely. Since the holsters, taser, and handcuffs were not visible to the agents when they opened the smaller closet as part of a "cursory" security check for hidden dangerous persons, this evidence must be suppressed.

CONCLUSION

The agents were entitled to enter Rudaj's bedroom in order to find clothing for him to wear. The two guns on either side of the nightstand, as well as the money and keys scattered across the top of the dresser, were in plain view to those agents, and were properly seized. The closets were lawfully entered as part of a protective sweep incident to the entry into Rudaj's bedroom for the purpose of procuring clothing. The incriminating evidence found in the master closet was in plain view of the agents lawfully in the closet and was also properly seized. The box and bag removed from the smaller closet, in contrast, were not patently incriminating and should not have been disturbed without a warrant. The contents of the box must therefore be suppressed.

SO ORDERED

Dated: New York, New York
October 3, 2005

/s/ Denise Cote
DENISE COTE
United States District Judge

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 31st day of August, two thousand and nine,

UNITED STATES COURT OF APPEALS FILED

AUG 31, 2009

Catherine O'Hagan Wolfe, Clerk
SECOND CIRCUIT

United State of America,

Appellee,

v.

Prenka Ivezaj, Nardino Colotti, Alex Rudaj, Angelo DiPietro, Nikola Dedaj, and Ljusa Nuculovic,

Defendants-Appellants.

06-3112-cr (L)
06-3275-cr (CON)
06-3296-cr (CON)
06-3339-cr (CON)
06-3372-cr (CON)
06-5908-cr (CON)

Appellant Alex Rudaj having filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*, and the panel that determined the appeal having considered the request for panel rehearing, and the active members of the Court having considered the request for rehearing *en banc*,

IT IS HEREBY ORDERED that the petition is denied.

For the Court:
Catherine O'Hagan Wolfe, Clerk

By: /s/ Frank Perez
Frank Perez, Deputy Clerk